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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through
the Legislative Session of 1951

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers

Under the Direction of

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Scope of Volume

Statutes:

Full text of Chapters 2 through 14 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1951 heretofore contained in Volume 1 of the General Statutes of North Carolina and the 1951 Cumulative Supplement thereto.

Annotations:

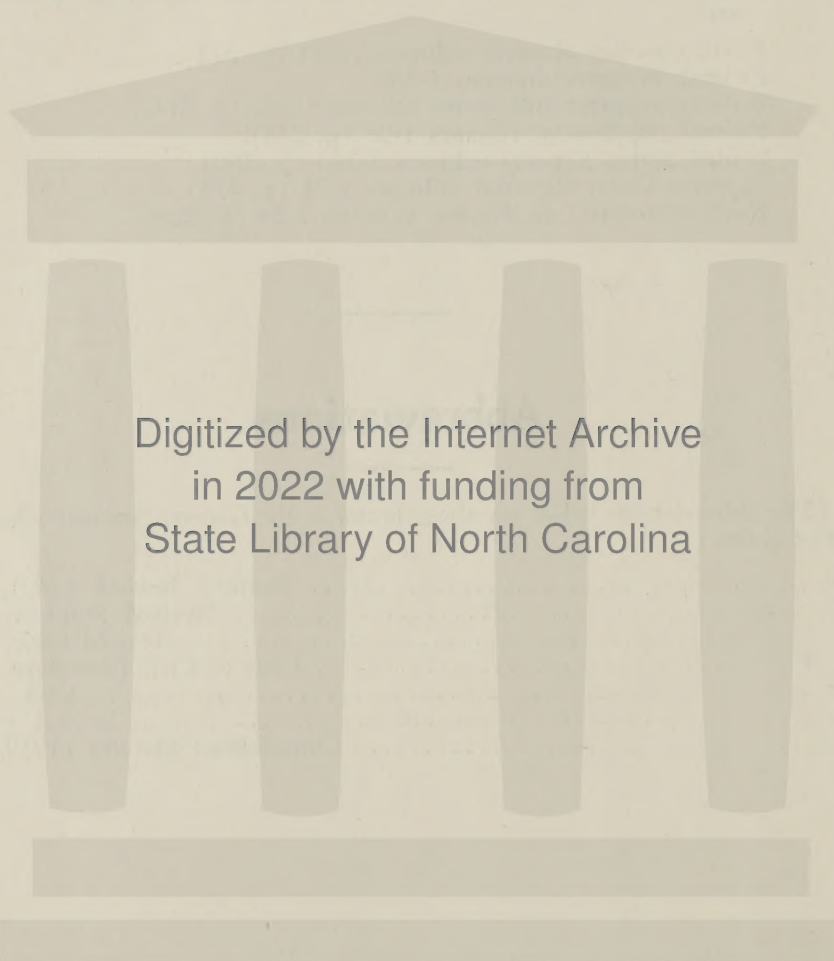
Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-233 (p. 312).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-186 (p. 744).
Federal Supplement volumes 1-95 (p. 248).
United States Reports volumes 1-340 (p. 366).
Supreme Court Reporter volumes 1-71 (p. 473).
North Carolina Law Review volumes 1-29 (p. 226).

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R.	Potter's Revisal (1821, 1827)
R. S.	Revised Statutes (1837)
R. C.	Revised Code (1854)
C. C. P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C. S.	Consolidated Statutes (1919, 1924)



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Preface

Volume 1 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 1A, 1B and 1C. These new volumes contain Chapters 1 through 27 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1951 Session. Chapter 1 appears in volume 1A, Chapters 2 through 14 are in volume 1B, and Chapters 15 through 27 are in volume 1C. The Constitution of North Carolina and the Constitution of the United States, appearing under Division I in original volume 1, have been transferred to Division XIX-A in recompiled volume 4A. As will be noted, this transfer is not shown in the Table of Contents appearing in Volumes 2A through 3C.

Both the statutes and the annotations in the recompiled volumes are in larger type and in more convenient form than in the original volume. The annotations in the new volumes comprise those which appeared in original volume 1 and the 1951 Cumulative Supplement thereto; however, they have been considerably revised, and it is believed that the present annotations are an improvement over the old.

The historical references appearing at the end of each section have been rearranged in chronological order. For instance, the historical references appended to § 31-5 read as follows: (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133; 1945, c. 140.) In this connection attention should be called to a peculiarity in the manner of citing the early acts in the historical references. The acts through the year 1825 are cited, not by the chapter numbers of the session laws of the particular years, but by the chapter numbers assigned to them in Potter's Revisal (published in 1821 and containing the acts from 1715 through 1820) or in Potter's Revisal continued (published in 1827 and containing the acts from 1821 through 1825). Thus, in the illustration set out above the citations "1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2" refer to the chapter numbers in Potter's Revisal and not to the chapter numbers of the Laws of 1784 and 1819, respectively. The chapter numbers in Potter's Revisal and Potter's Revisal continued run consecutively, and hence do not correspond, at least after 1715, to the chapter numbers in the session laws of the particular years. After 1825 the chapter numbers in the session laws are used. In Volumes 2A through 2C, there is no particular designation to show that an act is from Potter's Revisal. However, in the other volumes such an act is followed by "P. R.", meaning Potter's Revisal.

The recompiled volumes have been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

HARRY McMULLAN,
Attorney General.

June 12, 1953

Table of Contents

VOLUME I-A.

Division I. Constitutions (Transferred to Division XIX-A in volume 4A).

Division II. Courts and Civil Procedure (Chapter 1).

VOLUME I-B.

	PAGE
Division II. Courts and Civil Procedure (Chapters 2-12)	1
CHAP. 2. CLERK OF SUPERIOR COURT	3
Art. 1. The Office	4
Art. 2. Assistant Clerks	8
Art. 3. Deputies	9
Art. 4. Powers and Duties	10
Art. 5. Reports	27
Art. 6. Money in Hand; Investments	28
CHAP. 3. COMMISSIONERS OF AFFIDAVITS AND DEEDS	33
CHAP. 4. COMMON LAW	36
CHAP. 5. CONTEMPT	39
CHAP. 6. COSTS	48
Art. 1. Generally	49
Art. 2. When State Liable for Costs	54
Art. 3. Civil Actions and Proceedings	55
Art. 4. Costs on Appeal	64
Art. 5. Liability of Counties in Criminal Actions	66
Art. 6. Liability of Defendant in Criminal Actions	69
Art. 7. Liability of Prosecutor for Costs	70
Art. 8. Fees of Witnesses	73
Art. 9. Criminal Costs before Justices, Mayors, County or Record- ers' Courts	79
CHAP. 7. COURTS	80
Art. 1. Organization and Terms	87
Art. 2. Jurisdiction	89
Art. 3. Officers of Court	102
Art. 4. Supreme Court Library	104
Art. 5. Supreme Court Reports	104
Art. 6. Salaries of Supreme Court Employees	105
Art. 7. Organization	105
Art. 8. Jurisdiction	116
Art. 9. Judicial and Solicitorial Districts and Terms of Court ...	124
Art. 10. Special Terms of Court	160
Art. 11. Special Regulations	161
Art. 12. Commission for Improvement of Laws	166
Art. 13. Domestic Relations Courts	166
Art. 14. Election and Qualification	170
Art. 14A. Appointment by Judge and Abolition of Fee System ..	172
Art. 15. Jurisdiction	174
Art. 16. Dockets	182
Art. 17. Fees	183
Art. 18. Process	184
Art. 19. Pleading and Practice	188
Art. 20. Jury Trial	194

	PAGE
Art. 21. Judgment and Execution	196
Art. 22. Appeal	201
Art. 23. Forms	203
Art. 24. Municipal Recorders' Courts	214
Art. 25. County Recorders' Courts	223
Art. 26. Municipal-County Courts	229
Art. 27. Provisions Applicable to All Recorders' Courts	229
Art. 28. Civil Jurisdiction of Recorders' Courts	230
Art. 29. Elections to Establish Recorders' Courts	232
Art. 29A. Alternate Method of Establishing Municipal Recorders' Courts ; Establishment without Election	234
Art. 30. Establishment, Organization and Jurisdiction	234
Art. 31. Practice and Procedure	240
Art. 32. District County Courts	244
Art. 33. With Jurisdiction Not to Exceed \$3000	248
Art. 34. With Jurisdiction Not to Exceed \$5000	252
Art. 35. With Jurisdiction Not to Exceed \$1500	255
Art. 36. County Criminal Courts	261
Art. 37. Special County Courts	266
Art. 38. Judicial Council	273
CHAP. 8. EVIDENCE	275
Art. 1. Statutes	276
Art. 2. Grants, Deeds and Wills	279
Art. 3. Public Records	286
Art. 3A. Findings, Records and Reports of Federal Officers and Employees	288
Art. 4. Other Writings in Evidence	289
Art. 4A. Photographic Copies of Business and Public Records ..	294
Art. 5. Life Tables	295
Art. 6. Calendars	299
Art. 7. Competency of Witnesses	299
Art. 8. Attendance of Witness	323
Art. 9. Attendance of Witnesses from without State	325
Art. 10. Depositions	327
Art. 11. Perpetuation of Testimony	338
Art. 12. Inspection and Production of Writings	339
CHAP. 9. JURORS	343
Art. 1. Jury List and Drawing of Original Panel	343
Art. 2. Petit Jurors ; Attendance, Regulation and Privileges	349
Art. 3. Peremptory Challenges in Civil Cases	355
Art. 4. Grand Jurors	356
Art. 5. Special Venire	362
CHAP. 10. NOTARIES	365
CHAP. 11. OATHS	370
Art. 1. General Provisions	370
Art. 2. Forms of Official and Other Oaths	374
CHAP. 12. STATUTORY CONSTRUCTION	380
Division III. Criminal Law and Procedure	391
CHAP. 13. CITIZENSHIP RESTORED	393
CHAP. 14. CRIMINAL LAW	396
Art. 1. Felonies and Misdemeanors	405
Art. 2. Principals and Accessories	410
Art. 3. Rebellion	413
Art. 4. Subversive Activities	414

	PAGE
Art. 5. Counterfeiting and Issuing Monetary Substitutes	415
Art. 6. Homicide	416
Art. 7. Rape and Kindred Offenses	425
Art. 8. Assaults	432
Art. 9. Hazing	440
Art. 10. Kidnapping and Abduction	441
Art. 11. Abortion and Kindred Offenses	443
Art. 12. Libel and Slander	446
Art. 13. Injuring Others by Use of High Explosives	447
Art. 14. Burglary and Other Housebreakings	448
Art. 15. Arson and Other Burnings	454
Art. 16. Larceny	460
Art. 17. Robbery	470
Art. 18. Embezzlement	472
Art. 19. False Pretenses and Cheats	477
Art. 20. Frauds	486
Art. 21. Forgery	489
Art. 22. Trespasses to Land and Fixtures	493
Art. 23. Trespasses to Personal Property	507
Art. 24. Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee	509
Art. 25. Regulating the Leasing of Storage Batteries	510
Art. 26. Offenses against Public Morality and Decency	511
Art. 27. Prostitution	524
Art. 28. Perjury	526
Art. 29. Bribery	528
Art. 30. Obstructing Justice	530
Art. 31. Misconduct in Public Office	532
Art. 32. Misconduct in Private Office	539
Art. 33. Prison Breach and Prisoners	539
Art. 34. Custodial Institutions	542
Art. 35. Offenses against the Public Peace	543
Art. 36. Offenses against the Public Safety	547
Art. 37. Lotteries and Gaming	550
Art. 38. Marathon Dances and Similar Endurance Contests	559
Art. 39. Protection of Minors	559
Art. 40. Protection of the Family	561
Art. 41. Intoxicating Liquors	567
Art. 42. Public Drunkenness	569
Art. 43. Vagrants and Tramps	571
Art. 44. Regulation of Sales	573
Art. 45. Regulation of Employer and Employee	575
Art. 46. Regulation of Landlord and Tenant	578
Art. 47. Cruelty to Animals	580
Art. 48. Animal Diseases	581
Art. 49. Protection of Livestock Running at Large	581
Art. 50. Protection of Letters, Telegrams, and Telephone Mes- sages	582
Art. 51. Protection of Athletic Contests	583
Art. 52. Miscellaneous Police Regulations	584
Art. 53. Sale of Weapons	592
Art. 54. Sale, etc., of Pyrotechnics	594
Art. 55. Handling of Poisonous Reptiles	594

VOLUME I-C.

Division III. Criminal Law and Procedure (Chapters 15-19).

Division IV. Motor Vehicles.

Division V. Commercial Law.

VOLUME II-A.

Division VI. Decedents' Estates.

Division VII. Fiduciaries.

Division VIII. Real and Personal Property.

Division IX. Domestic Relations.

VOLUME II-B.

Division X. Corporations and Associations.

Division XI. Police Regulations.

VOLUME II-C.

Division XII. Occupations.

Division XIII. Employer and Employee.

Division XIV. Miscellaneous Provisions.

Division XV. Taxation.

VOLUME III-A.

Division XVI. State Government and Agencies (Chapters 106-116).

VOLUME III-B.

Division XVI. State Government and Agencies (Chapters 117-150).

VOLUME III-C.

Division XVII. County and City Government.

Division XVIII. Elections and Election Laws.

Division XIX. Concerning the General Statutes of North Carolina; Veterans;
Civil Defense.

VOLUME IV-A.

Division XIX-A. Constitutions.

Division XX. Appendix.

I. Rules of Practice in the Supreme Court and Superior Courts of North
Carolina.

(1) Rules of Practice in the Supreme Court of North Carolina.

(2) Rules of Practice in the Superior Courts of North Carolina.

- II. Removal of Causes.
- III. Authentication of Records.
- IV. Extradition.
- V. Naturalization.
- VI. Rules, Regulations, Organization, and Canons of Ethics of North Carolina State Bar.
- VII. Rules Governing Admission to Practice of Law.
- VIII. Comparative Tables.

VOLUME IV-B.

Division XXI. Index.

Division II. Courts and Civil Procedure.

	PAGE
Chap. 1. See Volume 1A.	
2. Clerk of Superior Court	3
3. Commissioners of Affidavits and Deeds	33
4. Common Law	36
5. Contempt	39
6. Costs	48
7. Courts	80
8. Evidence	275
9. Jurors	343
10. Notaries	365
11. Oaths	370
12. Statutory Construction	380

Chapter 2.

Clerk of Superior Court.

Article 1.

The Office.

Sec.

- 2-1. Judge of probate abolished; clerk acts as judge.
- 2-2. Election; term of office.
- 2-3. Clerk's bond.
- 2-4. Clerk's bond; approval, acknowledgments and custody.
- 2-5. Oath of office.
- 2-6. Vacancy; judge of district fills.
- 2-7. Removal for cause.
- 2-8. Office and equipment furnished.
- 2-9. Solicitor to examine and report on office.

Article 2.

Assistant Clerks.

- 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.
- 2-11. Certificate of appointment; confirmation; revocation of appointment; compensation.
- 2-12. Clerks not relieved from duties; deputies.

Article 3.

Deputies.

- 2-13. Appointment.
- 2-14. Record of appointment and discharge; copies.
- 2-15. Responsibility of clerk for deputy's acts.

Article 4.

Powers and Duties.

- 2-16. Powers enumerated.
- 2-16.1. Validation of oaths administered by clerks.
- 2-16.2. Validation of oaths administered to public officers.
- 2-17. Disqualification to act.
- 2-18. Prior orders and judgments validated.
- 2-19. Waiver of disqualification.
- 2-20. Disqualification unwaived; cause removed or judge acts.
- 2-21. Disqualification at time of election; judge acts.
- 2-22. Custody of records and property of office.
- 2-23. Unperformed duties of outgoing clerk.
- 2-24. Location of and attendance at office.
- 2-25. Obtaining leave of absence from office.
- 2-26. Fees of clerk of superior court.
- 2-27. Local modifications as to clerk's fees.

Sec.

- 2-28. Fees for probating and recording federal crop liens and chattel mortgages.
- 2-29. Advance court costs.
- 2-30. Advance costs on appeal from justice of the peace.
- 2-31. Fee for cross-indexing names of parties.
- 2-32. Fee for docketing judgment.
- 2-33. Fee for auditing annual accounts of receivers, executors, etc.
- 2-34. Fee for auditing final accounts of receivers, executors, etc.
- 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.
- 2-36. Certain counties not subject to §§ 2-29 to 2-35.
- 2-37. To keep fee bill posted.
- 2-38. To furnish blank process, bonds and undertakings.
- 2-39. To file papers in proceedings.
- 2-40. To keep records of his office; obtaining originals or copies.
- 2-41. To endorse date of issuance on process.
- 2-42. To keep books; enumeration.
- 2-43. To notify commissioners of insolvency of surety company in which county officer bonded.

Article 5.

Reports.

- 2-44. List of justices of the peace to be sent to Secretary of State.
- 2-45. List of attorneys at law to Commissioner of Revenue.

Article 6.

Money in Hand; Investments.

- 2-46. Public funds to be reported to county commissioners.
- 2-47. Approval, registration, and publication of report.
- 2-48. Report compelled by commissioners.
- 2-49. Payment to persons entitled.
- 2-50. Unclaimed fees of jurors and witnesses paid to school fund.
- 2-51. Use by public until claimed.
- 2-52. Payment of insurance to persons under disability.
- 2-53. Payment of money for indigent children and persons non compos mentis.
- 2-54. Limitation on investment of funds in clerk's hands.

Sec.

2-55. Investments prescribed; use of funds in management of lands of infants or incompetents.

2-56. Securing bank deposits.

2-57. Inspection of records by Local Government Commission; report to solicitor of mismanagement.

Sec.

2-58. Inspection and audit by county auditors or accountants; reports of audits.

2-59. Liquidation of present funds within year.

2-60. Violation of §§ 2-54 to 2-59 a misdemeanor.

ARTICLE 1.

The Office.

§ 2-1. **Judge of probate abolished; clerk acts as judge.**—The office of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court as clerks of said court.

In the exercise of his duties in matters relating to his probate jurisdiction, any clerk of the superior court may sign his name as "Clerk Superior Court, Ex Officio Judge of Probate". (Code, s. 102; Rev., s. 889; C. S., s. 925; 1951, c. 158.)

Cross Reference.—As to powers and jurisdiction generally, see §§ 1-7, 1-13, 1-393, 1-406, and 2-16.

Editor's Note.—The 1951 amendment added the second paragraph.

The office of probate judge was created by the Constitution of 1868. The powers of the probate judge were extensive and his jurisdiction embraced many of the vital transactions of the business community. It covered the proof of wills, deeds, and official bonds; the appointment and revocation of guardians of infants and lunatics; the granting and revocation of letters testamentary and of administration; the auditing of the accounts of guardians, executors, and administrators; he could bind out apprentices, cancel indentures, and exercise jurisdiction in many other matters which might be prescribed by law. Although the office has now been abolished by the Constitution of 1883, the legislature has seen fit, on the score of economy and practical administration, to shift the jurisdiction of matters of probate, plus certain other specified matters, to the clerk of the superior court.

Jurisdiction. — Under this section the duties of the probate judge devolve upon the clerk of the superior court, and in such case he has a special jurisdiction which is distinct and separate from his general duties as clerk. *Brittain v. Mull*, 91 N. C. 498 (1884); *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556 (1895).

The clerk acts not as the servant or ministerial officer of the superior court or as and for the court, but as an independent tribunal of original jurisdiction. *Edwards v. Cobb*, 95 N. C. 5 (1886).

The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. *Brittain v. Mull*, 91 N. C. 498 (1884).

The clerk has jurisdiction of a proceeding by a ward against his guardian for an account. *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265 (1890). See also *Rowland v. Thompson*, 65 N. C. 110 (1871).

The clerks of superior courts have jurisdiction of proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N. C. 5 (1886).

Although the clerks of the superior courts have no equity jurisdiction, they are given probate jurisdiction by this section, and in the exercise of their probate jurisdiction they may hear and rule on a petition of an executor for authorization to operate the estate's farms to preserve the property pending the determination of caveat proceedings. *Hardy & Co. v. Turnage*, 204 N. C. 538, 168 S. E. 823 (1933).

Stated in Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (1942) (con. op.)

§ 2-2. **Election; term of office.**—A clerk of the superior court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly.

Clerks of the superior court shall hold office for four years. (Const., art. 4, ss. 16, 17; Rev., s. 890; C. S., s. 926.)

Cross Reference.—See § 163-4.

Appointee.—When there is a vacancy and the judge appoints one to fill that vacancy, such appointee holds office only until the next election at which members

of the General Assembly are chosen. *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905), overruling *Deloatch v. Rogers*, 86 N. C. 358 (1882).

§ 2-3. Clerk's bond.—At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it is the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than twenty-five thousand dollars, payable to the State of North Carolina, and with a condition to be void if he shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are or thereafter shall be prescribed by law: Provided that in counties having a population in excess of fifty thousand inhabitants, the penalty of the clerk's bond shall be not less than ten thousand dollars, and not more than fifty thousand dollars. (C. C. P., s. 137; Code, s. 72; 1889, c. 7; 1891, c. 385; 1895, cc. 270, 271; 1899, c. 54, s. 52; 1901, c. 32; 1903, c. 747; Rev., s. 295; C. S., s. 927; 1931, c. 170; 1943, c. 713.)

Local Modification. — Camden, Hyde, Tyrrell: 1939, c. 30; Carteret, Currituck, Pamlico: C. S. 929; Chowan: 1939, c. 299; Jones: 1925, c. 10; Mecklenburg: 1925, c. 184; Washington: Pub. Loc. 1935, c. 6.

Cross References.—As to liability and action on bond, see §§ 2-4, 109-34, 109-36. As to interest, see § 24-5. As to cemeteries, see § 65-11. As to surety by mortgage, see § 109-28.

Editor's Note.—The 1931 amendment increased the maximum penalty of the bond from fifteen thousand to twenty-five thousand dollars, and the 1943 amendment added the proviso.

Purpose.—In *Thomas v. Connelly*, 104 N. C. 342, 10 S. E. 520 (1889), it was said, "The purpose of this provision is very broad and comprehensive. It requires every clerk of the superior courts to give bond, with sufficient sureties, to secure the faithful discharge of his official duties, and especially, among other things, to secure the accounting for and paying over according to law of all moneys and effects that may be or come into his hands by virtue or color of his office."

"Color of His Office."—"Color of his office," has been construed to embrace all cases where the officer receives the money in his official capacity, when he is not authorized or required to receive the same. *Greenlee v. Sudderth*, 65 N. C. 470 (1871); *Brown v. Cable*, 76 N. C. 391 (1877); *Ex parte Cassidy*, 95 N. C. 225 (1886);

Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520 (1889); *Sharpe v. Connelly*, 105 N. C. 87, 11 S. E. 177 (1890); *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897 (1891). See also *McNeill v. Morrison*, 63 N. C. 508 (1869); *Cox v. Blair*, 76 N. C. 78 (1877).

Scope of Bond.—This section requires only one bond to be given by the clerk, and the condition is extensive enough to cover every possible default in office. *Hunter v. Routlege*, 51 N. C. 216 (1858).

An official bond given by a clerk, upon his entry into office, covers his whole official term, whether a new bond be given afterwards or not. *Hunter v. Routlege*, 51 N. C. 216 (1858).

The clerk's bond embraces receiverships and incidental liabilities growing out of them. *Syme v. Bunting*, 91 N. C. 48 (1884); *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897 (1891); *Waters v. Melson*, 112 N. C. 89, 16 S. E. 918 (1893).

The bond also covers funds which have come into the hands of the clerk under a statute enacted subsequent to the execution of the bond. *Wilmington v. Nutt*, 78 N. C. 177 (1878); *Wilmington v. Nutt*, 80 N. C. 266 (1879); *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897 (1891). See also, *Cameron v. Campbell*, 10 N. C. 285 (1824); *State v. Bradshaw*, 32 N. C. 229 (1849).

Cumulative Security.—The clerk's bond is cumulative security for the performance of official duties. *Darden v. Blount*, 126 N. C. 247, 35 S. E. 479 (1900).

Liability on Bond.—The surety bond of

a clerk of the superior court is fixed as to amount in the sum of five thousand dollars [in Pamlico County], and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principle applies and the surety is liable for 6 per cent interest on the judgment until it is paid. *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897 (1891); *State v. Martin*, 188 N. C. 119, 123 S. E. 631 (1924).

A clerk and his sureties are liable on his bond as an insurer for money that comes into his hands, and not merely for the exercise of good faith in regard to such money. *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849 (1902). See generally, *Havens v. Lathene*, 75 N. C. 505 (1876); *Morgan v. Smith*, 95 N. C. 396 (1886); *Board of Education v. Bateman*, 102 N. C. 52, 8 S. E. 882, 11 Am. St. Rep. 708 (1889).

Where a defaulting clerk succeeds himself, and has given the required bond for each term, with the same surety, and continues his defalcation, the surety is liable only to the amount of the bond given for each term. *State v. Martin*, 188 N. C. 119, 123 S. E. 631 (1924).

And the burden is on the sureties of the bond in force when the money was received by the clerk to show that he paid it over to himself as his own successor. *Morgan v. Smith*, 95 N. C. 396 (1886).

The clerk is liable on his bond for failure to pay over funds paid to him by commissioners in partition. *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849 (1902).

Where a clerk of the superior court has forged the signatures of Confederate pensioners to warrants issued by the State Auditor and sent to him for payment to the persons entitled, and has witnessed such signatures, cashed the warrants, and converted the funds to his own use, such sums are received by him by virtue of and under color of his office, and come within the terms of his bonds given under the provisions of this section, and the surety thereon is liable within the penalty of the bonds for the amount so embezzled. *State v. Gant*, 201 N. C. 211, 159 S. E. 427 (1931).

Same — Negligence. — A clerk who is negligent in issuing an execution was held to be liable in damages for whatever sum the plaintiff might show he had sustained by such nonfeasance. *McIntyre v. Merritt*, 55 N. C. 558 (1856).

Action on Bond. — No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there has been

such damages sustained as would give the party a right to maintain an action on the case or the neglect of his official duty. *Jones v. Biggs*, 46 N. C. 364 (1854).

In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be final, since the action is not for the breach of an express or implied contract to pay a definite sum of money fixed by the terms of the bond or ascertainable therefrom, but must be "by default and inquiry." *Battle v. Baird*, 118 N. C. 854, 21 S. E. 668 (1896). See *Morgan v. Bunting*, 86 N. C. 67 (1882).

A demand is necessary before bringing an action upon the bond of a clerk for moneys, payable to private individuals, received under color of his office, and the statute of limitations will not begin to run in his favor until after such demand is made. But it is otherwise if he has converted the money, or if it is public money. *Furman v. Timberlake*, 93 N. C. 66 (1885).

Same—Proper Parties.—Under this section, claimants of a fund arising from a partition sale are the proper parties to sue on the bond of the clerk for failure of the clerk to pay funds by the commissioners in partition. *Smith v. Patton*, 131 N. C. 396, 42 S. E. 849 (1902).

Where a clerk wrongfully prefers one judgment creditor over another in issuing executions, the wronged party has a remedy upon the official bond of the clerk for the actual loss sustained by his misconduct. *Bank v. Jones*, 17 N. C. 284 (1832).

Same—Evidence.—In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. *Morgan v. Smith*, 95 N. C. 396 (1886).

Effect Where Penalty of Bond Exceeds Amount Prescribed.—Although this section is directory and prescribes the penalty on the bond of a clerk of the superior court, both the clerk and his surety are presumed to know the provisions of the statute, and where the clerk has voluntarily executed a bond in a greater sum, and the surety has accepted premiums based on a bond in this amount, the surety is estopped to deny the validity of the bond, and the plaintiff may recover of the surety, upon a proper showing, to the full amount of the penalty of the bond. *State v. Gant*, 201 N. C. 211, 159 S. E. 427 (1931).

Clerical Error.—An error in reciting the

term of office in the bond, which is clearly clerical and inadvertent, does not invalidate the bond, but will be treated as surplusage. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896). See also, *Sprinkle v. Martin*, 69 N. C. 175 (1873).

§ 2-4. Clerk's bond; approval, acknowledgments and custody.—The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe-keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds. (C. C. P., s. 138; Code, s. 73; Rev., s. 296; C. S., s. 928.)

Cross Reference.—As to bond, approval and custody, see §§ 109-11, 109-12. See annotations to §§ 109-34, 109-36.

Evidence.—The clerk's bond may be proved, as at common law, without being subjected to the strict rules of evidence, and if there is a subscribing witness it may be proved by other witnesses, as if there was no subscribing witness. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896).

A duly certified copy of the record of the registered bond is competent evidence

Guarantors of Funds Received by Virtue of Office.—Clerks of the superior court are insurers and guarantors of funds coming into their hands by virtue or color of their offices. *Thacker v. Fidelity, etc., Co.*, 216 N. C. 135, 4 S. E. (2d) 324 (1939).

of its provisions. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896).

Presumptions.—The clerk of the superior court being required to give a bond for the discharge of the duties of his office, etc., it will be presumed, in the trial of an action on such bond, that he did so; and any such bond found in the keeping of the proper custodian will be presumed to have been properly given and accepted as such. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896).

§ 2-5. Oath of office.—The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county. (C. C. P., s. 139; Code, s. 74; Rev., s. 891; C. S., s. 930.)

Cross References.—As to oath, see §§ 11-6, 11-7, 11-11. See also, §§ 2-5, 14-229. As to oath of deputy, see § 2-13.

§ 2-6. Vacancy; judge of district fills.—1. Otherwise than by expiration. In case the office of clerk of a superior court for a county becomes vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

2. Failure to qualify. In case any clerk fails to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

3. Resignations. Any clerk of the superior court may resign his office to the judge of the superior court residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy. (Const., art. 4, s. 29; C. C. P., s. 140; Code, ss. 76, 78; Rev., ss. 892, 893, 895; C. S., s. 931.)

Cross References.—As to failure to give satisfactory bond, see § 109-8. As to bond of successor, see § 109-9. As to willfully failing to discharge duties as ground for removal, see § 14-230.

Commissioners' Duty.—A failure on the

part of the clerk to give bond must be ascertained by the commissioners before the judge is authorized to declare a vacancy. And in accepting or rejecting the bond tendered, the court cannot interfere in the exercise of their discretion.

Buckman v. Commissioners, 80 N. C. 121 (1879).

Conflicting Claimants.—Where there are conflicting claimants for a vacant office a court must act upon the prima facie evi-

dence of right and admit the one possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. Clark v. Carpenter, 81 N. C. 309 (1879).

§ 2-7. **Removal for cause.**—Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this State. (1868-9, c. 201, s. 53; Code, s. 123; Rev., s. 894; C. S., s. 932.)

Cross References. — See Constitution, Art. VI, § 8; Art. XIV, § 7. As to restoration of citizenship, see § 13-1.

§ 2-8. **Office and equipment furnished.**—The requisite stationary, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross-index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person. (C. C. P., s. 428; Code, ss. 82, 84, 113; Rev., s. 896; C. S., s. 933.)

§ 2-9. **Solicitor to examine and report on office.**—The solicitor of the judicial district shall inspect the office of the clerk as often as he shall deem it necessary, and shall make written report of his inspection to the court. (C. C. P., s. 147; Code, s. 88; Rev., s. 897; 1917, c. 81, s. 1; C. S., s. 934; 1935, c. 423.)

Editor's Note.—Prior to the amendment of 1935 the section required an inspection at every regular term and also provided

the penalty in case the solicitor neglected or failed to perform his duty.

ARTICLE 2.

Assistant Clerks.

§ 2-10. **Appointment; oath; powers and jurisdiction; responsibility of clerks.**—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint an assistant clerk of the superior court, who before entering upon his duties shall take and subscribe the oath prescribed for clerks: Provided, that not more than one such assistant clerk shall hold office at one time in any county having a population of less than twenty-five thousand (25,000); that in counties having a population of twenty-five thousand (25,000) but not over fifty thousand (50,000), two such assistant clerks may be appointed; that in counties having a population of over fifty thousand (50,000) but not over eighty thousand (80,000), three such assistant clerks may be appointed; that in counties having a population of eighty thousand (80,000) or over, four such assistant clerks may be appointed. Upon compliance with the provisions of this article such assistant clerk or clerks shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be entitled to the same faith and credit as those of such clerk. Such assistant clerks shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover

the acts of their assistant clerks. (1921, c. 32, s. 1; C. S., s. 934(a); 1951, c. 159, ss. 1, 2.)

Local Modification.—Guilford: 1937, c. 331; 1941, c. 91; New Hanover: 1943, c. 514; 1951, c. 93.

Editor's Note.—The 1951 amendment rewrote the proviso to the first sentence, and inserted the words "or clerks" in the second sentence. Section 3 of the amendatory act, which repealed all laws in conflict with the act, excepted "any local statutes pertaining to the appointment or number of assistant clerks of the superior court."

Funds of minors paid into the hands of the assistant clerk of the superior court, appointed guardian, were not paid into court, and the surety on the guardianship

bond may not successfully contend that the clerk's bond was liable therefor. *State v. Royal Indemnity Co.*, 203 N. C. 420, 166 S. E. 327 (1932).

While the clerk of the superior court is a constitutional officer, the duties of clerks are prescribed by statute, and the legislature may prescribe that such duties may be performed by assistant clerks as in this and the following sections, and an attack upon the appointment of a guardian by an assistant clerk on the ground that the statute delegating the powers of clerks to assistant clerks is unconstitutional is untenable. In *re Barker*, 210 N. C. 617, 188 S. E. 205 (1936).

§ 2-11. **Certificate of appointment; confirmation; revocation of appointment; compensation.**—Any clerk of the superior court desiring to appoint such an assistant clerk shall present a formal written certificate of such appointment to the superior court judge residing in his district, and such judge, if he concurs in and approves such appointment, shall in writing enter his consent and approval upon such certificate and confirm such appointment. Said certificate of appointment, and approval of the judge, together with the oath subscribed by the appointee, shall thereupon be entered in full upon the minute docket of the court, and shall be recorded and cross-indexed in the office of the register of deeds for such county. The appointment of any such assistant clerk may be revoked at any time by the clerk who appointed him or by the superior court judge resident in the district, by the entry of the word "revoked" and the date thereof, with the signature of such clerk or judge, upon the margin of the records of such appointment in the offices of the clerk of the superior court and the register of deeds; and all such appointments shall expire by limitation when the clerk making same ceases to hold office. Nothing in this article shall increase the fees or compensation now allowed by law to the clerks or deputy clerks of the superior court of the several counties of the State. (1921, c. 32, s. 2; C. S., s. 934(b).)

§ 2-12. **Clerks not relieved from duties; deputies.**—This article shall not in anywise excuse or relieve the clerk of the superior court from giving to the performance of his duties the same time, care, and attention as is now required of such clerks by law, nor shall it change or amend the present laws with reference to deputy clerks of the superior court: Provided, that one person may be appointed both as assistant clerk and as deputy. (1921, c. 32, s. 3; C. S., s. 934(c).)

ARTICLE 3.

Deputies.

§ 2-13. **Appointment.**—Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks. (1777, c. 115, s. 86, P. R.; R. C., c. 19, s. 15; Code, s. 75; Rev., s. 898; C. S., s. 935.)

Purpose.—In *Miller v. Miller*, 89 N. C. 402 (1883), it was said: "The purpose of creating the office of 'deputy clerk' was to help the dispatch of public business, and to provide for the same when the clerk might be necessarily absent from his office, or unable for any cause to give per-

sonal attention to his official duties."

Section Provides Only Method of Appointment.—Deputy clerks can be appointed only in the manner prescribed by this section. *Shepherd v. Lane*, 13 N. C. 148 (1828). And are required to take the same oaths before entering upon their

duties which are required of their principals. *Jackson v. Buchanan*, 89 N. C. 75 (1883.)

The certificate of probate of a deed by a deputy clerk, expressly authorized by statute to acknowledgment, etc., the deed having been duly registered, was prima facie evidence of his appointment and qualification. *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70 (1893).

Scope of Authority.—Deputy clerks may do all the acts which the clerk may do, except such as are judicial in their character, or such as a statute may require specially to be done by the clerk himself. *Miller v. Miller*, 89 N. C. 402 (1883); *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70 (1893).

Deputies are expressly authorized to take acknowledgment and proof of deeds,

and in exercising such functions a deputy acts by force of the statute alone, and not as the agent of or by a delegation of authority from the clerk. *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70 (1893).

The probate of a deed of trust or mortgage by one acting as deputy clerk, but who had not been duly appointed, nor qualified by taking the prescribed oath, is invalid. *Suddereth v. Smyth*, 35 N. C. 452 (1852).

Women as Deputies.—It would seem that women are not disqualified under the Constitution nor any statute from holding the office of deputy clerk. See *State v. Bateman*, 162 N. C. 588, 77 S. E. 768 (1913); *Bank v. Redwine*, 171 N. C. 559, 88 S. E. 878 (1916); *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586 (1922).

§ 2-14. **Record of appointment and discharge; copies.**—Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index of the same, and shall furnish to the register of deeds of his county a transcript of such record; and such register of deeds shall record the same in the records of deeds in his office and make a cross-index thereof on the general index in his office. When any such deputy clerk is removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "Revoked" and the date of such revocation, and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts. (1899, c. 235, s. 3; Rev., s. 899; C. S., s. 936.)

§ 2-15. **Responsibility of clerk for deputy's acts.**—The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks. (1899, c. 235, s. 2; Rev., s. 900; C. S., s. 937.)

Liability for Acts.—Both deputy and clerk are liable for an unlawful act committed by the deputy under color of the office. *Coltraine v. McCain*, 14 N. C. 308 (1832). See also, *Bank v. Redwine*, 171 N. C. 559, 88 S. E. 878 (1916).

Deputy's Bond.—This section does not require any bond of a deputy clerk; but, as the clerk is liable for the defaults and misfeasance of his deputies, common prudence dictates that he require bonds of

them for his own protection. Such a bond, not being required by law, is not an official bond in the strict sense of that term. When given, however, it is valid as a common-law bond, the clerk individually, and not the public, being the obligee in interest thereunder. The fact that it runs in the name of the clerk as clerk is immaterial. *Fidelity, etc., Co. v. Hoyle*, 64 F. (2d) 413 (1933).

ARTICLE 4.

Powers and Duties.

§ 2-16. **Powers enumerated.**—Every clerk has power—

1. To issue subpoenas to compel the attendance of any witness residing or being in the State, or to compel the production of any bond or paper, material to any inquiry pending in his court.

2. To administer any and all oaths, including oaths of office to any and all public officers of this State, and to take acknowledgment of the execution of all instruments or writings.

3. To issue commissions to take the testimony of any witness within or without this State.

4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

5. To enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the State.

7. To preserve order in his court and to punish contempts.

8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

10. To enter judgment in any suit pending in his court in the following instances: judgment of voluntary nonsuit in any case where judgment is permitted by law; and judgment in any suit by consent of parties.

11. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

12. To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice.

13. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

14. To take proof of wills and grant letters testamentary and of administration.

15. To revoke letters testamentary and of administration.

16. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

18. To exercise jurisdiction conferred on him in every other case prescribed by law. (C. C. P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1.)

Cross References.—As to acknowledgments, see § 47-1. As to depositions, see §§ 8-71 through 8-84. As to process, see §§ 1-303, 1-305, 1-307, 1-313. As to use of copies of court papers in evidence, see § 8-34. As to probate, see §§ 28-1, 28-2, 31-17, 47-1, 47-14, 47-37. As to revocation of letters testamentary and of administration, see §§ 28-31, 28-32, 28-46. As to guardians, see §§ 33-1 through 33-62. As to accounts of executors, etc., see §§ 1-406, 28-117, 28-121, 28-135, 28-136, 33-41. As to reports to Commissioner of Revenue, see § 105-22. As to power of clerk to discharge insolvent debtors when convicted in justice of peace court, see § 23-25. As to fixing compensation of commissioners for division of lands, see § 46-7.1. As to clerk acting as temporary guardian of children of certain service men, see § 33-67. As to duty of clerk to name suc-

cessor to trustee in a deed of assignment for benefit of creditors, see § 23-4. As to requirement of being present at the opening of lock boxes of decedents, see § 105-24. For "color of his office" construed, see annotations to § 2-3. As to clerks acting as notaries, see § 10-3.

Editor's Note.—The 1949 amendment made changes in subsection 2. The 1951 amendment, which does not apply to litigation instituted prior to July 1, 1951, inserted in subsection 2 the words "including oaths of office to any and all public officers of this State."

Legislature May Take Away or Modify Powers.—The powers and duties of clerks enumerated in this section are given and fixed by legislative enactment, and there is no constitutional barrier to the legislature's taking away, adding to, or modifying them; or authorizing them to be ex-

exercised and performed by another. In re Barker, 210 N. C. 617, 188 S. E. 205 (1936).

Jurisdiction—Limited.—The clerk of the superior court is a court of very limited jurisdiction. Russ v. Woodard, 232 N. C. 36, 59 S. E. (2d) 351 (1950). Such court has only such jurisdiction as is given by statute. It has no common-law or equitable jurisdiction. McCauley v. McCauley, 122 N. C. 288, 30 S. E. 344 (1898).

Same—Corrections.—The clerk has the jurisdiction to correct a mistake in a partition proceeding. Wahab v. Smith, 82 N. C. 232 (1880); Little v. Duncan, 149 N. C. 84, 62 S. E. 770 (1908).

Or in a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, he has the right to set aside the sale and order a resale by showing proper cause. Lovinier v. Pearce, 70 N. C. 168 (1874).

Same—Administrators.—The clerk has the power, for good and sufficient cause, to remove an administrator; or for like cause, as necessarily equivalent, to permit him to resign his trust. Murrill v. Sandlin, 86 N. C. 54 (1882); Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430 (1889).

It is thus incumbent on the probate judge (now the clerk) to make inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer is to be exercised. Murrill v. Sandlin, 86 N. C. 54 (1882).

Same—Accounts.—The jurisdiction for auditing accounts of executors, administrators, etc., conferred upon the clerk is an ex parte jurisdiction of examining the accounts and vouchers of such persons,

allowing them commissions, etc., as formerly practiced, and does not conclude legatees, etc., or affect suits inter partes upon the same matters. Heilig v. Foard, 64 N. C. 710 (1870).

The words, "audit the account of executors, administrators and guardians," have reference to the duty of examining accounts filed by executors, etc., to see that the account of charges corresponds with the inventories, passing upon the vouchers and striking a balance, after allowing commissions, as under the existing laws. Heilig v. Foard, 64 N. C. 710 (1870).

Vacating, etc., Decrees or Orders—Fixing Time for Hearings.—Within his jurisdiction the clerk of the superior court has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. Russ v. Woodard, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

Probate of Wills.—This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. Brissie v. Craig, 232 N. C. 701, 62 S. E. (2d) 330 (1950).

Appeals.—In appeals from the clerk, in that class of cases of which he has jurisdiction in his capacity as clerk, as given under this section, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N. C. 271 (1886).

Applied in Braddy v. Pfaff, 210 N. C. 248, 186 S. E. 340 (1936).

Cited in Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562 (1940).

§ 2-16.1. Validation of oaths administered by clerks.—The act of any clerk of the superior court in administering any oath prior to the ratification of this section, when such was not necessary in the exercise of the powers and duties of his office, is hereby ratified and validated; provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 57, s. 2.)

Editor's Note.—The act inserting this section was ratified Feb. 11, 1949, and became effective July 1, 1949.

§ 2-16.2. Validation of oaths administered to public officers.—All official oaths heretofore administered to public officers by the clerks of the superior courts of this State are hereby, in all respects, ratified, confirmed and validated. (1951, c. 28, s. 2.)

Editor's Note.—The act inserting this section does not apply to litigation instituted prior to July 1, 1951.

§ 2-17. Disqualification to act.—No clerk can act as such in relation to any estate, proceeding or civil action—

1. If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

2. If he is so related to any person having or claiming such interest that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him.

3. If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or noncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

4. If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

5. If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate. (C. C. P., s. 419; 1871-2, c. 196; Code, s. 104; Rev., s. 902; C. S., s. 939; 1935, c. 110, s. 1.)

Cross References.—As to clerk's disqualification to be appointed to sell real estate, see § 46-31. As to probate where clerk is a party, see § 47-7. As to probate of will when clerk interested in property disposed of, see § 31-12. As to validation of orders of registration, see § 47-61.

Editor's Note.—The amendment of 1935 effected only one change in this section. Prior to the amendment the opening statement read: "No clerk can act as such in relation to any estate or proceeding." As to purpose of amendment, see 13 N. C. Law Rev. 370.

Clerk Interested.—The clerk is disqualified, both by common-law rules and by this section, to act in any cause wherein he is interested. *Gregory v. Ellis*, 82 N. C. 225 (1880); *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890); *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954 (1901).

The probate of a deed by a clerk interested therein is a nullity. *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954 (1901).

And where he is personally interested in the commissions to be allowed the executors, he is excluded from jurisdiction. *Barlow v. Norfleet*, 72 N. C. 535 (1875).

Same—Judicial and Ministerial Acts.—The act of "admitting to probate" is a judicial act, and a clerk is prohibited from acting on a deed or deed of trust in which he is grantor or grantee. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890); *Freeman v. Person*, 106 N. C. 251, 10 S. E. 1037 (1890); *Piland v. Taylor*, 113 N.

C. 1, 18 S. E. 70 (1893); *Norman v. Ausbon*, 193 N. C. 791, 138 S. E. 162 (1927).

But the issuing of a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can be performed by a deputy, or even by the clerk, in a case to which he is a party. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633 (1887); *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890).

Nor is a clerk incompetent to take acknowledgment of the execution of a deed because he is a subscribing witness to the document. He cannot take proof of a deed of which he is the subscribing witness, because he cannot administer oath to himself. *Trenwith v. Smallwood*, 111 N. C. 132, 15 S. E. 1030 (1892).

And it has been the practice in this State for clerks to issue process either for or against themselves. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633 (1887).

Clerk Related to Party.—A clerk is prohibited from acting as such in relation to any estate or proceeding if he is so related to any person having, or claiming to have, such interest that he would by reason of such relationship be disqualified as a juror. *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954 (1901).

But probate and private examination taken before an officer are not invalid simply because he is related to the parties. *McAllister v. Purcell*, 124 N. C. 264, 32 S. E. 715 (1899).

§ 2-18. Prior orders and judgments validated.—In all cases where the clerk was disqualified to act in relation to a civil action, in which the procedure as prescribed and set out by §§ 2-19, 2-20 and 2-21 was followed, all orders and judgments rendered in such civil actions by the judge or other clerk are hereby validated as fully and to the same extent as if this section had at such time been in force; provided, this section shall not apply in such cases if an action has prior to March 20, 1935, been instituted attacking such order or judgment. (1935, c. 110, s. 3.)

§ 2-19. Waiver of disqualification.—The parties may waive the disqualification specified in subdivisions one, two, three and five of § 2-17 and upon filing in the office such waiver in writing, the clerk shall act as in other cases. (C. C. P., s. 420; Code, s. 105; Rev., s. 903; C. S., s. 940.)

Written Waiver.—The waiver must be in writing and made when the opposing parties are present and capable of objecting. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890).

Probate a Nullity.—When the probate

of a deed is a nullity because the clerk was disqualified to act the defect is not cured by the approval of the final decree, under which it is made, by the judge of the superior court. *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954 (1901).

§ 2-20. Disqualification unwaived; cause removed or judge acts.—When any of the disqualifications specified in this chapter exist, and there is no waiver thereof, or when the disqualification does not permit of waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district; or may apply to the judge to make and render either in vacation or term time all necessary orders and judgments in any proceeding where the clerk is disqualified, and the judge in such cases is hereby authorized and empowered to make and render any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceeding. (C. C. P., s. 421; Code, s. 106; Rev., s. 904; 1913, c. 70, s. 1; C. S., s. 941.)

Cited in *In re Estate of Smith*, 226 N. C. 169, 37 S. E. (2d) 127 (1946).

§ 2-21. Disqualification at time of election; judge acts.—In all cases where the clerk of the superior court is executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it is his duty to order the proper record to be made by the clerk, and the accounts to be filed in court. (1871-2, c. 197; Code, s. 107; Rev., s. 905; C. S., s. 942.)

Action.—The proper practice, in a proceeding against an administrator who at the time was elected clerk, seems to be to make the summons returnable before him,

and then, transfer the whole proceeding before the district judge, who will make the necessary orders in the premises. *Wilson v. Abrams*, 70 N. C. 324 (1874).

§ 2-22. Custody of records and property of office.—1. Receipt from Predecessor. — Immediately after he has given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk refuses or fails within a reasonable time after demand to deliver such records, books, papers, moneys and property, he is liable on his official bond for the value thereof.

2. Transfer to Successor; Penalty.—Upon going out of office for any reason, any clerk of the superior, inferior, or criminal court shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate) all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. In case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, fails to transfer and deliver them as herein directed, he shall forfeit and pay to the

State one thousand dollars, which shall be sued for by the prosecuting officer of that court. (R. C., c. 19, s. 14; C. C. P., s. 142; Code, ss. 81, 124; Rev., ss. 906, 907; C. S., s. 943.)

Cross Reference. — As to failure to deliver as a misdemeanor, see § 14-231.

Order and Demand. — A person, duly elected clerk of the superior court by the people, needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. *Peebles v. Boone*, 116 N. C. 58, 21 S. E. 187 (1895).

But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge, directing the person temporarily in charge, to deliver the possession of his office to such clerk. *Peebles v. Boone*, 116 N. C. 58, 21 S. E. 187 (1895).

Right of Action.—The right of clerk of a superior court to bring an action against his predecessor on the latter's official bond to recover the records, money, etc., in his hands, does not rest on any injury done to the plaintiff, but on the ground that the law requires that each successive clerk shall receive from his predecessor all the records, money and property of his office. *Peebles v. Boone*, 116 N. C. 58, 21 S. E. 187 (1895).

Remedy.—When an outgoing clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty.

§ 2-23. Unperformed duties of outgoing clerk.—1. Performance Secured. — When, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk has failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk.

2. Liability on Outgoing Clerk's Bond.—Such portion thereof as may be paid by the county may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relation of the board of commissioners of the county. (1844, c. 5, s. 6; R. C., c. 19, s. 19; Code, s. 87; Rev., s. 908; C. S., s. 944.)

Proceeding Recorded. — Where an outgoing clerk has failed to record a proceeding, the court has the power, and it is its duty, on the application of an interested

O'Leary v. Harrison, 51 N. C. 338 (1859).

Two Distinct Remedies Provided.—Our statutes provide two separate and distinct remedies—one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, as provided for in § 109-34, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in this section. *State v. Watson*, 223 N. C. 437, 27 S. E. (2d) 144 (1943); *State v. Watson*, 224 N. C. 502, 31 S. E. (2d) 465 (1944).

Where Clerk Sought to Be Removed Made Affirmative Allegations.—In an action by the clerk of the superior court against his predecessor in office, for possession of records, books and funds, under this section, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations. *State v. Watson*, 223 N. C. 437, 27 S. E. (2d) 144 (1943).

When Liability Ceases.—When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. *Gregory v. Morisey*, 79 N. C. 559 (1878).

party, to have such proceeding recorded as of its proper date. *Foster v. Woodfin*, 65 N. C. 29 (1871).

§ 2-24. Location of and attendance at office.—The clerk shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock a. m. to

three o'clock p. m., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit an amount not exceeding two hundred dollars, said amount to be fixed and determined by the resident judge of his district or the judge presiding in said district upon the complaint of any citizen. Provided, that the clerk's office in the respective counties may observe such office hours and holidays as authorized and prescribed by the board of county commissioners for all county offices. (C. C. P., s. 141; 1871-2, c. 136; Code, ss. 80, 114, 115; Rev., s. 909; C. S., s. 945; 1939, c. 82; 1941, c. 329; 1949, c. 122, s. 1.)

Local Modification. — Currituck, Moore, section.
Richmond: 1939, c. 82, s. 3.

Editor's Note. — The 1939 amendment, which provides that it shall not apply to the counties of Currituck, Moore and Richmond, struck out the words "he shall forfeit his office" formerly appearing at the end of the second sentence and inserted in lieu thereof the present forfeiture provision. The amendment also added the proviso.

The 1941 amendment struck out an exception as to Cumberland County formerly appearing in the proviso.

The 1949 amendment rewrote the proviso appearing as the last sentence of the

Forfeiture of Office.—A single failure on the part of a clerk to keep his office open on Monday from 9 a. m. to 4 p. m., for the transaction of probate business (unless such failure is caused by sickness), is a distinct and complete cause for forfeiture of his office. *People v. Heaton*, 77 N. C. 18 (1877).

Quo Warranto.—The forfeiture of office incurred by a superior court clerk as herein provided by failing to keep open his office on Monday, can only be enforced by proceedings in the nature of quo warranto. *People v. Heaton*, 77 N. C. 18 (1877); *State v. Norman*, 82 N. C. 687 (1880).

§ 2-25. Obtaining leave of absence from office.—Upon application of any clerk of the superior court to the judge of the superior court residing in the district in which the clerk resides, the judge of the superior court riding the district or judge of superior court presiding in the county of said clerk, showing good and sufficient reason for the clerk to absent himself from his office, the judge may issue an order allowing him to absent himself from his office for such time as the judge may deem proper. But he shall at all times leave a competent deputy in charge of his office during his absence. The order of the judge granting leave of absence shall be filed and recorded in the office of the clerk of the county in which the clerk resides. Provided, it shall not be necessary when a clerk has an assistant clerk to secure an order permitting a leave of absence; and, provided further, it shall not be necessary when a clerk has a deputy clerk, but no assistant clerk, to secure an order permitting a leave of absence unless such absence extends more than forty-eight hours. (1903, c. 467; Rev., s. 910; C. S., s. 946; 1935, c. 348; 1949, c. 122, s. 2.)

Editor's Note. — The 1935 amendment made the section applicable when application is made by "the judge of the superior court riding the district or judge of supe-

rior court presiding in the county of said clerk."

The 1949 amendment added the provisos at the end of this section.

§ 2-26. Fees of clerk of superior court.—The fees of the clerk of the superior court shall be the following, and no other, namely:

Advertising and selling under mortgage in lieu of bond, two dollars for sales of real estate and one dollar for sales of personal property.

Affidavit, including jurat and certificate, twenty-five cents.

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the Supreme Court, including certificate and seal, two dollars.

Appointing and qualifying justices of the peace, to be paid by the justice, twenty-five cents.

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

Auditing account of receiver, executor, administrator, guardian or other trustee, required to render accounts, if not over three hundred dollars, fifty cents; if over three hundred dollars and not exceeding one thousand dollars, eighty cents; if over one thousand dollars, one dollar.

Auditing final settlement of receiver, executor, administrator, guardian or other trustee, required to render accounts, one-half of one per cent of the amount on which commissions are allowed to such trustee, for all sums not exceeding one thousand dollars, and for all sums over one thousand dollars; one-tenth of one per cent on such excess; but such fees shall not exceed fifteen dollars, unless there be a contest, when the clerk shall have one per cent on the said excess over one thousand dollars; but in no instance shall his fees exceed twenty-five dollars.

Auditing and recording the final account of commissioners appointed to sell real estate, one-half of the fees allowed for auditing and recording final accounts of executors.

Bill of costs, preparing same, twenty-five cents.

Bond or undertaking, including justification, sixty cents.

Canceling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

Capias, when the defendant is not arrested thereunder, shall be such sum as the commissioners of his county may allow.

Caveat to a will, entering and docketing same for trial, one dollar.

Certificate, except where it is a charge against the county, twenty-five cents; and where it is a charge against the county, the fee shall be such sum not exceeding twenty-five cents as the board of commissioners shall allow.

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing ex parte proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.

Filing all papers, ten cents for each case.

Guardian, appointment of, including taking bond and justification, one dollar.

Impaneling jury, ten cents.

Indexing judgment on cross-index book, ten cents for the judgment, regardless of number of parties.

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

Injunction, order for, including taking bond or undertaking and justification, one dollar.

Judgment, final, in term-time, civil action, one dollar.

Judgment, final, against each defendant, in criminal actions, one dollar.

Judgment, final, before the clerk, fifty cents.

Judgment by confession, without notice, all services, three dollars.

Judgment in favor of widow for year's support, fifty cents.

Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.

Juror ticket, including jurat, ten cents.

Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.

Letters of administration, including bond and justification of sureties, one dollar.

Motions, entry and record of, twenty-five cents.

Notices, twenty-five cents, and for each name over one in same paper, ten cents additional.

Notifying solicitors of removal of guardian, one dollar.

Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.

Order of arrest, one dollar.

Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.

Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.

Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women, who acknowledged at the same time, with the certificate thereof, twenty-five cents.

Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.

Probate of limited partnership, fifty cents.

Probate of will in common form and letters testamentary, one dollar.

Qualifying justice of the peace, to be paid by the justice, twenty-five cents.

Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

Recognizance, each party where no bond is taken, twenty-five cents.

Recording and copying papers, per copy-sheet, ten cents.

Recording appointment of process agent for nonresident, fifty cents.

Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.

Registering trained nurses, including certificate of registration, fifty cents.

Recording certificates of incorporation of corporations, three dollars.

Recording names of jurors as required by law, five cents for each name.

Resignation of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.

Seal of office, when necessary, twenty-five cents.

Subpoena, each name, fifteen cents.

Summons, in civil actions or special proceedings, including all the names therein, one dollar, and for every copy thereof, twenty-five cents.

Transcript of judgment, twenty-five cents.

Transcript of any matter of record or papers on file, per copy-sheet, ten cents.

Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.

Witness ticket, including jurat, ten cents.

Five per cent commission shall be allowed the clerk on all fines, penalties, amercements and taxes paid the clerk by virtue of his office; and three per cent on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under article three of chapter forty-five; and upon the excess over five hundred dollars of such sums, one per cent.

Provided, that in such counties of the State where the clerk of superior court is now or may hereafter be paid a salary in lieu of fees, that such clerk of superior court shall not charge and collect a fee for juror ticket, including jurat, or witness ticket, including jurat, as herein prescribed. (Code, ss. 229, 1789, 3109, 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 261, 578; 1901, c. 121; 1901, c. 614, s. 3; 1903, c. 359, s. 6; 1905,

c. 360, s. 3; Rev., s. 2773; 1917, c. 198, s. 6; 1919, c. 329; C. S., s. 3903; 1927, c. 247; 1929, cc. 45, 214; 1933, c. 91; 1945, c. 635.)

Local Modification. — Carteret: 1943, c. 697; Franklin: 1927, c. 137; Harnett: 1933, c. 75; Johnston: 1943, c. 653; Northampton: 1931, c. 11; Richmond: 1947, c. 235, s. 8; Transylvania: 1951, c. 1212, s. 1; Wake: 1945, c. 733; Wilson: 1935, c. 241.

Cross References.—As to compensation and liability of clerk in settling an estate see § 28-171. As to fees of clerk for recording certificate of incorporation, see § 55-159. As to costs of appeal generally, see § 6-33 and annotations. As to costs of transcript on appeal taxed in Supreme Court, see § 6-34. As to costs of appeal from justices of the peace, see § 6-35. As to new provision relating to fees for docketing judgments and for auditing accounts, not applicable in certain counties, see §§ 2-32 through 2-35.

Editor's Note. — The 1927 amendment, which added the proviso at the end of this section, provided that it should not apply to Chatham County; however, by Public Laws 1929, c. 214, the 1927 act was amended to make it applicable to Chatham County. Public Laws 1933, c. 91, repealed the provision of Public Laws 1929, c. 45, which provided for fees in Halifax County.

The 1945 amendment substituted "chapter forty-five" for "chapter fifty-four" in the next to the last paragraph.

Appeal from Justices of the Peace. — When a defendant is bound over to the superior court by a justice of the peace, the clerk of the superior court is not entitled to the fee of 50 cents allowed for appeal from justice of the peace. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897).

Fee taxable for appeal and docketing in Supreme Court. See *State v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897).

Appeal from Taxation of Costs.—An appeal lies to the Supreme Court from the erroneous taxation of items in bill of costs in the superior court. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897).

The fees for continuances of cases allowed to the clerk of the superior court must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. *Luther v. Southern R. Co.*, 154 N. C. 103, 69 S. E. 762 (1910).

Motion for Judgment. — The fee of twenty-five cents for motion for judgment can only be taxed when the motion is a motion in the cause, in writing, and re-

quired to be recorded. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897).

Filing Papers.—The fee of 10 cents allowed the clerk of the superior court for "filing papers," is for filing all the papers in an action after final judgment, and not for filing each paper in a case. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897).

Transcript on Appeal When Fees Unpaid.—The clerk of the court below is entitled to receive his fees before being required to send up a transcript on appeal, and therefore a writ of certiorari will be refused where it appears from the affidavit of the clerk that the transcript was not sent up because the appellant failed, after repeated demands, to pay the fees, and in his reply to the answer setting forth the clerk's affidavit the petitioner did not tender the fees. *Saunders v. Thompson*, 114 N. C. 282, 19 S. E. 225 (1894).

Same—When Incomplete.—Where the clerk of the superior court fails to send up as a part of the transcript the drawing and swearing in of the grand jury who found the indictment, he will not be allowed his costs for making and sending up the transcript of the record. *State v. Cameron*, 122 N. C. 1074, 29 S. E. 418 (1898).

Settlement of Estate.—Where the clerk of the court was appointed a commissioner of the courts to sell certain lands and invest the proceeds, etc., and it appearing that he had rendered services of value, with no indication of conversion, misapplication, or commingling of funds, it was held that he was entitled to his commissions in the settlement of the estate. *Hannah v. Hyatt*, 170 N. C. 634, 87 S. E. 517 (1916).

Section 6-36 a Proviso.—The true construction of this section regulating the fees of clerks, is had by reading as a proviso at the end thereof § 6-36. *Coward v. Commissioners*, 137 N. C. 299, 49 S. E. 207 (1904).

Recording in the Minute Docket. — The clerk of the superior court is not entitled to a specific fee for recording the proceedings of a cause in the minute docket of the court. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897).

Clerk's Allowance for Stating Account Disallowed.—Where the plaintiff recovered judgment in the court below and it was ordered that an allowance be made to the clerk for stating an account, one-half to be paid by the plaintiffs and the other half by the defendants it was held to be error. *Wall v. Covington*, 76 N. C. 150 (1877).

Nolle Prosequi.—The clerk of the court

is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. *State v. Johnson*, 101 N. C. 711, 8 S. E. 360 (1888).

When Judgment Is against State or County.—Costs are not allowed for docketing, filing and indexing a judgment against the State or county, since no lien can be acquired by such docketing. *State v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897).

The State and county are liable for costs

only in the cases expressly provided by statute. *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897).

A county cannot be taxed, under § 6-36 with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897).

Cited in *Watson v. Lee County*, 224 N. C. 508, 31 S. E. (2d) 535 (1944).

§ 2-27. Local Modifications as to clerk's fees.—For the probate of a short-form lien bond, or lien bond and chattel mortgage combined, the clerk shall receive ten cents in the following counties: Alamance, Alleghany, Ashe, Beauford, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Greene, Harnett, Iredell, Johnston, Jones, Lenior, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Union, Vance, Warren, Washington, Watauga, Wayne, Wilson. (Rev., s. 2773; 1907, c. 717; 1909, c. 502; P. L. 1917, c. 182; C. S., s. 3904; 1933, c. 84; 1947, c. 235, s. 11.)

In Anson, this fee is twenty cents. (P. L. 1913, c. 49; C. S., s. 3904.)

In Bertie County the clerk of the superior court shall collect the sum of fifteen cents for each crop lien or lien bond probated by him for registration in Bertie County, including all services connected therewith. (P. L. 1915, c. 163; C. S., s. 3904.)

In Forsyth County the clerk shall receive fifteen cents for the probate of a deed or other writing, acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof. He shall also receive fifteen cents for the probate of a deed or other writing, proved by a witness, including the certificate. (P. L. 1913, c. 626; C. S., s. 3904.)

In Jackson County, in addition to the fees now allowed by law, the clerk shall receive the sum of five dollars for writing up the minutes of each day's session of the superior court of the county, to be paid by the county. (P. L. 1913, c. 182; C. S., s. 3904.)

In Mitchell County the clerk of superior court shall receive double the amount of fees and commissions as provided in § 2-26 of this chapter. (1931, c. 53, s. 1.)

In Robeson County the board of county commissioners may make an allowance to the clerk of the superior court for keeping the records of the court and transcribing the minutes, to be paid out of the general county fund. (Rev., s. 2773; C. S., s. 3904.)

From and after February 27, 1923, it shall be unlawful for the clerks of the superior courts of Bertie, Northampton, Vance, Warren and Wayne counties to charge fees for witness and juror tickets issued by them. (C. S., s. 3904; 1923, c. 92.)

Local Modification.—Harnett: 1933, c. 75; Johnston: 1943, c. 653.

Editor's Note.—Public Laws 1933, c. 84, inserted Scotland in the list of coun-

ties appearing in the first paragraph, and Session Laws 1947, c. 235, s. 11, struck "Richmond" therefrom.

§ 2-28. Fees for probating and recording federal crop liens and chattel mortgages.—The fee to be charged by the clerk of the superior court for the probate of a federal crop lien or a federal chattel mortgage given to secure a seed and fertilizer loan from the United States government, or crop production loans, live stock loans, and/or other loans made by the Regional Agriculture Cred-

it Corporation of Raleigh, North Carolina and/or production credit associations in North Carolina as provided for by the Farm Credit Act of Congress of one thousand nine hundred and thirty-three, or the North Carolina Rural Rehabilitation Corporation or other relief organizations by relief clients, shall be limited to twenty-five cents for each probate; and the fee of the register of deeds for registering said instrument shall be limited to fifty cents for each lien or chattel mortgage: Provided that this section shall not apply to Beaufort, Brunswick, Cabarrus, Camden, Caswell, Currituck, Guilford, Harnett, Haywood, Hertford, Macon, Moore, Nash, Pamlico, Person, Polk, Richmond, Stokes, Surry, and Wilson counties. (1933, cc. 160, 176, 266, 281, 326, 393, 429, 479, 514; 1935, cc. 120, 260, 369; 1939, c. 211; 1945, cc. 78, 312, 880, 913; 1949, c. 368, s. 1; 1951, c. 40, s. 1; 1951, c. 419.)

Local Modification.—Beaufort: 1949, c. 368, s. 21; Cabarrus: 1945, c. 880, s. 2; Gates, Johnston: 1945, c. 517; Jones, Moore, Perquimans, Richmond, Rowan, Wilson: 1935, c. 120, s. 2; Stanly: 1935, c. 260; Transylvania: 1951, c. 1212, s. 2; Wilson: 1935, c. 388.

Editor's Note.—This section was originally enacted by Public Laws 1933, c. 160. Public Laws 1933, c. 176, struck Caswell from the list of counties exempted from the operation of this section. Public Laws 1933, c. 266, inserted the words "or crop production loans, live stock loans, and/or other loans made by the Regional Agriculture Credit Corporation of Raleigh, North Carolina". Public Laws 1933, c. 281, inserted Haywood, Jackson and Macon in the list of exempted counties; Public Laws 1933, c. 326, inserted Brunswick; Public Laws 1933, c. 393, inserted Harnett, Johnston, Polk, Moore and Wilson; Public Laws 1933, c. 429, added Stokes to the list; Public Laws 1933, c. 479, added Caswell, Hertford and Person to the list; and Public Laws 1933, c. 514,

added Surry.

Public Laws 1935, c. 120, which inserted the words beginning with "and/or production credit associations" and ending with "relief clients", provided that it should not apply to the counties of Rowan, Gates, Jones, Moore, Perquimans, Richmond and Wilson. Public Laws 1935, c. 260, added Stanly to the list of counties exempted from the operation of Public Laws 1935, c. 120.

Public Laws 1935, c. 369, struck Johnston from the list of counties exempted from the operation of this section, and Public Laws 1939, c. 211, struck Jackson from the list.

The first 1945 amendment inserted "Nash" in the list of counties in the proviso, the second inserted "Camden", the third inserted "Cabarrus," and the fourth inserted "Currituck." The 1949 amendment inserted "Beaufort" in the list of counties. The first 1951 amendment inserted "Pamlico" and the second 1951 amendment inserted "Guilford" in the list of counties.

§ 2-29. Advance court costs.—The clerk of the superior court is hereby authorized to collect as advance court cost on all suits started in any court the sum of seven dollars and fifty cents (\$7.50) for one defendant, and one dollar and a half for each additional defendant, which fees shall include any process tax or tax on suits and sheriff fees. (1935, c. 379, s. 2.)

Local Modification.—Catawba: 1939, c. 62; 1949, c. 414; Transylvania: 1951, c. 1212, s. 3.

§ 2-30. Advance costs on appeal from justice of the peace. — The clerk of the superior court is authorized to collect from the appellant in all cases in appeals from justices of the peace court to the superior court four dollars as advance cost to be applied on the court cost including the process tax. (1935, c. 379, s. 1.)

Local Modification.—Transylvania: 1951, c. 1212, s. 4.

Cited in Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 535 (1944).

§ 2-31. Fee for cross-indexing names of parties.—The fee for cross-indexing the name of each party to any action or proceeding required to be cross-indexed by law shall be ten cents for each name entered upon the cross-index records. (1935, c. 379, s. 3.)

Local Modification.—Transylvania: 1951, c. 1212, s. 5.

§ 2-32. Fee for docketing judgment.—The fee for docketing any judgment shall be ten cents per copy sheet, minimum charge twenty-five cents. (1935, c. 379, s. 4.)

Local Modification.—Transylvania: 1951, c. 1212, s. 6.

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.—For auditing annual accounts of receivers, executors, guardians, administrators, administrators with will annexed, trustees for incompetents, trustees under wills, surviving partner, where the total receipts and disbursements do not exceed eleven thousand dollars, the fee shall be twenty-five cents for each one hundred dollars on receipts and disbursements or a fraction thereof through one thousand dollars. If the receipts and disbursements exceed one thousand dollars, the fee shall be for the receipts and disbursements above one thousand dollars five cents on each one hundred dollars or a fraction thereof through eleven thousand dollars. When the receipts and disbursements exceed eleven thousand dollars, the fee for the amount of same above eleven thousand dollars shall be one-tenth of one per cent on the amount of receipts and disbursements in excess of eleven thousand dollars, but in no event shall the fee be less than one dollar nor more than twenty-five dollars. Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 5; 1945, c. 1036, s. 1.)

Local Modification.—Anson and Lee: **Editor's Note.**—The 1945 amendment 1945, c. 1036, s. 2½; Transylvania: 1951, added the last sentence of this section. c. 1212, s. 7.

§ 2-34. Fee for auditing final accounts of receivers, executors, etc.—For auditing final accounts of receivers, executors, administrators, administrators with will annexed, collectors, trustees for incompetents, trustees under wills, guardians or surviving partner, the fee shall be fifty cents for each one hundred dollars or a fraction thereof of the total receipts and disbursements through one thousand dollars, and ten cents per each one hundred dollars or a fraction thereof on everything above one thousand dollars, but in no event shall the fee be less than two dollars: Provided, that when stocks, bonds or any other personal property is delivered to any heir or distributee without converting the same into cash, these fees shall be computed and charged on the same just as though they had been converted into cash; the value of said stocks, bonds, etc., to be fixed as of the date of death, or qualification of the fiduciary. Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 6; 1945, c. 1036, s. 2.)

Local Modification.—Anson: 1945, c. 2½; Transylvania: 1951, c. 1212, s. 8. 1036, s. 2½; Beaufort: 1939, c. 103; Durham: 1945, c. 115; Lee: 1945, c. 1036, s. **Editor's Note.**—The 1945 amendment added the last sentence of this section.

§ 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings.—For auditing final accounts of trustees, mortgagees, commissioners, or other persons, firms, or corporations selling real estate under foreclosure proceeding required to render such final report, the fees shall be twenty-five cents on each one hundred dollars of receipts and disbursements through one thousand dollars and ten cents on each one hundred dollars for everything above one thousand dollars, provided that the minimum fee shall be one dollar and fifty cents and the maximum fee shall not exceed twenty-five dollars. (1935, c. 379, s. 7.)

Local Modification.—Transylvania: 1951, c. 1212, s. 9.

§ 2-36. Certain counties not subject to §§ 2-29 to 2-35.—Sections 2-

29 to 2-35 shall not apply to the counties of: Alleghany, Ashe, Avery, Bladen, Buncombe, Burke, Caldwell, Caswell, Catawba, Chowan, Cleveland, Columbus, Cumberland, Davidson, Davie, Duplin, Edgecombe, Franklin, Guilford, Haywood, Iredell, Jackson, Jones, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pamlico, Person, Pitt, Richmond, Robeson, Rockingham, Rowan, Stokes, Swain, Tyrrell, Union, Vance, Washington, Wayne, Wilson. Provided, that § 2-29 shall apply to Iredell county. (1935, c. 379, s. 8; 1935, c. 494; 1937, cc. 148, 149, 290; 1945, c. 296; 1947, c. 269; 1949, c. 386.)

Editor's Note.—The 1937 amendments struck out Bertie and Yancey from the list of counties in this section, and added the proviso as to Iredell County.

The 1945 amendment struck out "Carras" from the list of counties, the 1947 amendment struck out "Surry" and the 1949 amendment struck out "Franklin."

§ 2-37. To keep fee bill posted.—Every clerk shall keep posted in his office in some conspicuous place the fee bill, for public inspection and reference, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for same. (Code, s. 3740; Rev., s. 2774; C. S., s. 947.)

§ 2-38. To furnish blank process, bonds and undertakings.—Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them. (C. C. P., s. 559; 1868-9, c. 279, s. 558; Code, s. 3761; Rev., s. 911; C. S., s. 948.)

§ 2-39. To file papers in proceedings.—The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment. All such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor. (C. C. P., ss. 146, 426; Code, ss. 86, 111; Rev., s. 912; C. S., s. 949.)

Cross Reference.—As to custody and transfer to successor, see § 2-22.

the single act of filing all the papers when the case is closed, as herein provided.

Filing Papers.—The fee allowed the clerk for "filing papers," is allowed for

Guilford v. Commissioners, 120 N. C. 23, 27 S. E. 94 (1897).

§ 2-40. To keep records of his office; obtaining originals or copies.—He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor. (C. C. P., s. 143; 1868-9, c. 159, s. 4; Code, s. 82; Rev., s. 913; C. S., s. 950.)

Clerk's Record.—Clerks are required to keep a record, in which shall be recorded all orders and decrees passed in their of-

fice, which they are required to make in writing. Gulley v. Macy, 81 N. C. 356 (1879).

§ 2-41. To endorse date of issuance on process.—The clerk shall note on all precepts, process and executions the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do

shall forfeit and pay one hundred dollars. (Code, s. 100; Rev., s. 914; C. S., s. 951.)

Cross Reference.—As to who may sue for and recover penalties, see § 1-58.

Action in Name of State.—An action brought against a sheriff, for the penalty herein provided for neglecting to note upon process the day on which it was received, should be in the name of the State as plaintiff. *Duncan v. Philpot*, 64 N. C.

479 (1870).

Final Process.—This section has no reference to the final process. *Wyche v. Newsom*, 87 N. C. 144 (1882). See also, *Person v. Newsom*, 87 N. C. 142 (1882).

Applied in State Board of Education v. Gallop, 227 N. C. 599, 44 S. E. (2d) 44 (1947).

§ 2-42. To keep books; enumeration.—Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:

1. Summons docket, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

2. Judgment docket, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

3. Civil issue docket, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

4. Cross-index to judgments, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket. Pending the docketing of judgments in the judgment docket and cross-indexing the same as herein provided for, the clerk shall keep a temporary index to all judgments entered in his said court or received in his court from any court for docketing; and he shall immediately index all judgments rendered in his court or received in his court for docketing, and index the names of all parties against whom judgments have been rendered or entered alphabetically in said temporary index, and which temporary index shall be preserved and open to the public until said judgments shall have been docketed in the judgment docket and cross-indexed in the permanent cross-index to judgments, as herein provided for.

5. Cross-index of Parties to Actions.—The clerk shall keep an alphabetical index and cross-index of all parties to all actions and special proceedings. Upon the issuance of summons or commencement of an *ex parte* proceeding he shall forthwith index and cross-index the names of all parties to such action or proceeding. When an order is made that any new or additional party be brought into an action or proceeding his name shall forthwith be indexed and cross-indexed by the clerk. The index shall be so arranged that beside each name shall appear a reference to the book and page whereon the action or proceeding will be found upon the summons docket, civil issue docket, special proceeding docket, and judgment docket, or such of said dockets as carry reference to said action or proceeding; and immediately upon said action or proceeding being entered upon any of said dockets the clerk shall cause said index to carry reference thereto upon the index and cross-index as to every party.

6. Record of lis pendens, which shall contain the names of the parties to the action, place where such notice, whether formal or in the pleadings, is filed, the object of the action, the date of indexing, and a sufficient description of the land to be affected, and which shall be cross-indexed.

7. Criminal docket, which shall contain a note of every proceeding in each criminal action.

8. Minute docket of superior court, which shall contain a record of all pro-

ceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

9. Special proceedings docket, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

10. Minute docket of proceedings before clerk, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

11. Record of wills, which shall contain a record of all wills, with the certificate of probate thereof.

12. Record of appointments, which shall contain a record of appointments of executors, administrators, guardians, and collectors, with revocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

13. Record of orders and decrees, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

14. Record of accounts, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

15. Record of settlements, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, commissioners, trustees under assignments for creditors, and guardians.

16. Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

17. Record of justices of the peace, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

18. Record of books, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records, and books returned to him.

19. Cross-index of wills, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each devisor, and all devisees as they are given in the will, together with the date of the probate of such will.

20. Cross-index of executors and administrators, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators made by the courts of their county, showing the name of the appointee, the name of the decedent, and date of appointment.

21. Cross-index of guardians, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

22. Record of fines and penalties, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

23. Lien docket, which shall contain a record of all notices of liens filed in his office, properly indexed, showing the names of the lienor and lienee.

24. Record of appointment of receivers, which shall contain a record of all

appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

25. Record of corporations, which shall contain a record of the certificate of incorporation of all corporations chartered under general law, with principal office or place of business in his county.

26. Accounts of indigent orphans, which shall contain a record of all receipts from persons for money paid for indigent children.

27. Register of physicians and surgeons, which shall contain a list of the names and places of residence, with date of registration, of all persons registered by him as physicians and surgeons.

28. Register of dentists, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

29. Register of chiropodists, which shall contain a list of the names and places of residence, with date of certificate, of all persons registered by him as chiropodists.

30. Register of trained nurses, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

31. Permanent roll of registered voters, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

32. Lunacy docket, which shall contain a record of all the examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

33. Record of county treasurer's report, which shall contain an itemized statement of all fines and penalties paid to the county treasurer; which said itemized statement of fines and penalties received by the county treasurer shall be by him reported to the clerk on the first day of January, April, July and October, respectively, of each and every year.

34. Nol. pros. with leave record, which shall contain a record of all cases in which a nolle prosequi with leave is entered in criminal actions, with the term of court at which the order is made, and which shall be cross-indexed.

35. Record of permits to purchase weapons, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons.* (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; 1899, cc. 82, 110; 1901, c. 2, s. 9; 1901, c. 89, s. 13; 1901, c. 550, s. 3; 1903, c. 51; 1903, c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; 1919, c. 152; 1919, c. 197, s. 4; 1919, c. 314; C. S., s. 952; 1937, c. 93.)

Local Modification.—Caldwell: Pub. Loc. 1927, c. 43; Durham: 1929, c. 88; Forsyth: 1949, c. 963, s. 4.

Cross Reference.—For provisions similar to paragraph 35, see § 14-405.

Editor's Note.—The 1937 amendment added the second sentence of subsection 4.

By virtue of the amendment, searchers of real property titles may examine the temporary index of judgments and ascertain in advance whether or not judgments have been rendered which, when docketed will affect the title to the realty in which their clients are interested. The new law will thus tend to facilitate real estate loans and transfers. 15 N. C. Law Rev. 337.

Purpose.—The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. *Edwards v. Cobb*, 95 N. C. 4 (1886).

Notice of Judgment Docket.—The law prescribes what shall be recorded on the judgment docket, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look else-

where for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice. *Holman v. Miller*, 103 N. C. 118, 9 S. E. 429 (1889); *Dewey v. Sugg*, 109 N. C. 328, 13 S. E. 923 (1891).

Civil Issue Docket.—Not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put upon the civil issue docket. *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840 (1893). See also, *Brittain v. Mull*, 91 N. C. 498 (1884); *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566 (1888).

Minute Docket.—The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566 (1888); *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897).

When Minute Docket Prevails.—While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566 (1888).

Record of Fiats.—Clerks are required to record in general order books copies of all fiats made by them. *Perry v. Bragg*, 111 N. C. 159, 16 S. E. 10 (1892).

Evidence of Appointment.—The record of appointments is admissible as evidence to show a guardian's appointment. *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14 (1888).

Sufficient Notice of Lien.—A notice of a lien filed on the lien docket should go

into details sufficiently so as to give reasonable notice to all persons of the character of the claim and the property upon which the lien is attached. *Fulp v. Power Co.*, 157 N. C. 157, 72 S. E. 867 (1911). See also, *Cook v. Cobb*, 101 N. C. 68, 7 S. E. 700 (1888); *Cameron v. Lumber Co.*, 118 N. C. 266, 24 S. E. 7 (1896).

Treasurer's Report as Evidence.—The record of county treasurer's report is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of statements therein made. *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545 (1887).

Recording of Verified Report Purports Verity.—Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested in the devisee, a special report, duly verified, filed by the executrix stating that the devisee had paid the estate the amount stipulated by the will. This special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action is untenable, the recorded, verified report being more than a mere declaration by the executrix. *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340 (1936).

Cited in *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4 (1941); *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942) (dis. op.).

§ 2-43. To notify commissioners of insolvency of surety company in which county officer bonded.—Every clerk of the superior court shall furnish the chairman of the board of county commissioners with all notifications furnished him, in accordance with § 58-117 under the article Fidelity Insurance of the Chapter Insurance, by the Insurance Commissioner, that any surety company in which any officer of the county is bonded is insolvent or in imminent danger of insolvency. (Rev., s. 295; C. S., s. 953.)

Cross Reference.—See also, § 109-18.

Editor's Note.—Section 58-117 referred to in this section has been repealed.

ARTICLE 5.

Reports.

§ 2-44. List of justices of the peace to be sent to Secretary of State.—The clerk of the superior court of each county shall, on or before February first of each year, send to the Secretary of State a list of the qualified justices of the

peace in his county as of January first of that year. The list shall include the following information with respect to each such justice of the peace:

1. The township for which he was elected or appointed.
2. The date of his election or appointment, and if appointed, by whom so appointed.
3. The term for which he was elected or appointed.
4. The date of his qualification. (1881, c. 326; Code, s. 89; 1901, c. 37, s. 2; Rev., s. 916; C. S., s. 954; 1945, c. 161.)

Editor's Note.—The 1945 amendment rewrote this section.

§ 2-45. List of attorneys at law to Commissioner of Revenue.—It shall be the duty of the clerk of the superior court in each county of the State on or before the first day of May of each year to certify to the Commissioner of Revenue of the State of North Carolina the names and addresses of all attorneys at law located within the county and engaged in the practice of law. (1931, c. 290.)

ARTICLE 6.

Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.—On the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority upon ten days' written notice, clerks of the superior courts shall make an annual report of all public funds which may be in their hands. The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include a statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths. Provided, further, that in the event the accounts of any clerk of the superior court are audited at least once each year by a certified public accountant, and the report and audit made by such certified public accountant sets forth all of the facts and items required by this section and is approved by the clerk and accepted by the board of county commissioners, such audit shall become and constitute the annual report required by this section. (1891, c. 580; Rev., s. 918; C. S., s. 956; 1931, c. 156; 1951, c. 187.)

Local Modification.—Bertie: Pub. Loc. 1941, c. 39; Carteret: 1941, c. 316; Forsyth: 1941, c. 109; 1945, c. 11; Greene: 1943, c. 146; Halifax: 1949, c. 389; Hertford: 1945, c. 101; Lenoir: 1945, c. 201; Rockingham: 1943, c. 378; Union: 1941, c. 316; Wake: 1943, c. 523; Wayne: 1939, c. 92.

Editor's Note.—The 1931 amendment inserted the words: "upon ten days' written notice" in the first sentence, and the 1951 amendment added the proviso at the end of this section. For construction of "color of his office," see § 2-3 and annotations.

Method of Procedure.—Where a clerk has admitted money to be due in the manner prescribed by this section, he can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years. *Summey v. Johnston*, 60 N. C. 98 (1863).

Prima Facie Case of Correctness.—This section raises a prima facie case of the correctness of the annual report of the clerk only when the statute is substantially complied with. *Gilmore v. Walker*, 195 N. C. 460, 142 S. E. 579 (1928).

§ 2-47. Approval, registration, and publication of report. — The board of commissioners shall refer all itemized statements made by the clerks of the superior courts to a special committee of their board, who shall compare the

same with the records of the clerk's office from which the report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which book shall be styled Record of Official Reports, with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "Approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. The register shall also cause a copy of the report to be published one time in some newspaper of general circulation published in the county of the register and also posted at the courthouse door within twenty days after filing the reports; and if no newspaper is published in the county the posting of the report at the courthouse door shall be a sufficient publication. The cost of publishing the report shall be paid by the county. (1874-5, c. 151; 1876-7, c. 276; Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; Rev., s. 919; C. S., s. 957.)

Local Modification.—Forsyth: 1945, c. 11; Wilson: 1943, c. 555. **Cited in** *Gilmore v. Walker*, 195 N. C. 460, 142 S. E. 579 (1928).

§ 2-48. **Report compelled by commissioners.**—If any clerk fails to report, or if after a report has been made the board of county commissioners have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action. (1874-5, c. 151, s. 3; 1876-7, c. 276; Code, s. 92; 1891, c. 580, s. 2; Rev., s. 920; C. S., s. 958.)

§ 2-49. **Payment to persons entitled.**—The said clerks shall, on or before the first day of January in every year after the statements required in the foregoing sections are made, account with and pay to the persons entitled to receive the same all such balances reported as aforesaid to be in their hands. (1823, c. 1186, s. 2, P. R.; 1831, c. 3, ss. 1, 3; R. C., c. 73, s. 2; Code, s. 1865; 1893, c. 14, s. 1; Rev., s. 921; C. S., s. 959.)

Account.—"Account" means a statement in writing of debts and credits, or of receipts and payments, and when payments or settlement is intended, additional words are used. *State v. Dunn*, 134 N. C. 663, 46 S. E. 949 (1904).

§ 2-50. **Unclaimed fees of jurors and witnesses paid to school fund.**—All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports. (1891, c. 580, s. 4; 1893, c. 14, s. 3; Rev., s. 922; C. S., s. 960.)

Local Modification.—Chatham: 1949, c. 906; Randolph: 1949, c. 519; Wayne: 1941, c. 70. **Cross Reference.**—See § 115-183.

§ 2-51. **Use by public until claimed.**—The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner. (1828, c. 41, s. 1; R. C., c. 73, s. 6; Code, s. 1869; Rev., s. 923; C. S., s. 961.)

Cross Reference.—See § 115-184.

§ 2-52. **Payment of insurance to persons under disability.**—Where a minor, incompetent or insane person is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor, or prior

to the restoration of competency or sanity of such incompetent or insane person, and the total proceeds of such policy or policies do not exceed five hundred dollars (\$500.00), such proceeds may be paid to the public guardian or clerk of the superior court of the county where such beneficiary resides, to be administered by the public guardian or clerk for the benefit of such beneficiary, and the receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies. Moneys so paid to the clerk or public guardian shall be held and disbursed in the manner and subject to the limitations provided by § 2-53. (1937, c. 201; 1945, c. 160, s. 1.)

Editor's Note.—This section applied only which also added the second sentence and to minors prior to the 1945 amendment, made other changes.

§ 2-53. Payment of money for indigent children and persons non compos mentis.—When any moneys in the amount of five hundred dollars or less are paid into court for any minor, indigent or needy child or children for whom there is no guardian, upon satisfactory proof of the necessities of such minor, child or children, the clerk may upon his own motion or order pay out of the same in such sum or sums at such time or times as in his judgment is for the best interest of said child or children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied for the sole benefit and maintenance of such minor indigent and needy child or children. The clerk shall take a receipt from the person to whom any such sum is paid and shall require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled, Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. This section shall also apply to incompetent or insane persons, and it shall be the duty of any person or corporation having in its possession \$500.00 or less for any minor child or indigent child, or incompetent or insane person to pay same in the office of the clerk of the superior court, and the clerk of the superior court is hereby authorized and empowered to disburse the sum thus paid into his office, upon his own motion or order, without the appointment of a guardian. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C. S., s. 962; Ex. Sess. 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1945, c. 160, s. 2; 1949, c. 188.)

Editor's Note.—The 1924 amendment made this section apply to all funds contemplated by it, when the amount did not exceed one hundred dollars for each child entitled to share therein.

The 1927 amendment added a proviso relating to persons non compos mentis which was struck out by the 1929 amendment. The latter amendment increased the amount in the first sentence from one hundred to three hundred dollars.

The 1933 amendment added the last

sentence of the section.

The 1945 amendment substituted in the first sentence the words "there is no guardian" for the words "no one will become guardian," and omitted the former third and fourth sentences relating to minor child as beneficiary of life insurance policy.

The 1949 amendment increased the maximum amount mentioned in this section from "\$300.00" to "\$500.00."

§ 2-54. Limitation on investment of funds in clerk's hands.—It shall be unlawful for the clerk of the superior court of any county in the State of North Carolina receiving any money by color of his office to apply or invest any of said money except as specifically authorized by law. (1931, c. 281, s. 1.)

Local Modification.—Cleveland: 1933, c. 110.

Editor's Note.—The act from which this and the six following sections are codified, was apparently intended to supply the need indicated in *William v. Hooks*, 199 N. C. 489, 154 S. E. 828 (1930), where in the court held that "there is no manda-

tory requirement of law imposing upon the clerk of the superior court the express duty of investing funds in his hands belonging to minors." The act is broader than that, however, and applies to all funds held by the clerk as such or as receiver or trustee for any infant or person non compos mentis. It should be read in

connection with §§ 2-46, 28-166 and 65-10.
See 9 N. C. Law Rev. 399.

Cited in *State v. Sawyer*, 223 N. C. 102,
25 S. E. (2d) 443 (1943).

§ 2-55. Investments prescribed; use of funds in management of lands of infants or incompetents.—The clerk of the superior court of any county in the State may in his discretion invest moneys secured by color of his office or as receiver in any of the following securities:

(a) By loaning the same upon real estate security, such loans not to exceed fifty per cent (50%) of the assessed tax value; and said loans when made to be evidenced by a note, or notes, of the borrower and secured by first mortgage or deed of trust.

(b) United States government bonds.

(c) United States government postal savings certificates.

(d) North Carolina State bonds.

(e) North Carolina county or municipal bonds which are approved by the Local Government Commission.

(f) Certificates of deposit for time deposit or savings accounts with any bank or trust company where such protection is furnished as required in § 2-56.

(g) When the clerk of the superior court as receiver or trustee for any infant or non compos mentis shall come into the possession of any lands for the use of such person and it shall be necessary to make investments of the funds of such person to manage or cultivate said lands, the clerk may make such investments as are necessary for said purposes: Provided, the same is approved by the resident judge of the superior court or the judge holding the court of the district. (1931, c. 281, s. 2; 1937, c. 188; 1939, c. 110.)

Local Modification.—Cleveland: 1933, c. 110; Forsyth: 1945, c. 876, s. 4.

Cross References.—As to investment of funds in building and loan associations, see § 36-3. As to investments in bonds issued or guaranteed by the United States government, see § 53-44.

Editor's Note.—In the investment of funds of infants or persons non compos mentis used in the management or culti-

vation of lands held for them by the clerk as receiver or trustee, he is unlimited by the items mentioned in this section. 9 N. C. Law Rev. 399.

The 1937 amendment substituted "Local Government Commission" for "Sinking Fund Commission" formerly appearing in subsection (e). The 1939 amendment inserted the words "or savings accounts" in subsection (f).

§ 2-56. Securing bank deposits. — It shall be the duty of the clerk of the superior court of any county in the State to require of any bank or trust company, wherein he may deposit money placed with him in trust, a corporate surety bond in an amount sufficient to protect such deposits, but in lieu of such corporate surety bond, the clerk may require such bank to furnish bonds of the United States government, North Carolina State bonds, or North Carolina county or municipal bonds which have been approved by the Local Government Commission; provided, however, that to the extent of the amount which may be insured by the Federal Deposit Insurance Corporation or other federal agency insuring bank deposits the said insurance shall be deemed and considered ample security, and the clerk of the superior court shall not require corporate surety bond or any of the bonds above specified for that amount of the deposit insured by deposit insurance. (1931, c. 281, s. 3; 1939, c. 86; 1943, c. 543.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

Editor's Note. — The 1939 amendment added the proviso to this section.

The 1943 amendment struck out the words "Sinking Fund Commission" and inserted in lieu thereof the words "Local Government Commission."

§ 2-57. Inspection of records by Local Government Commission; report to solicitor of mismanagement.—The Local Government Commission, or its successors, is hereby authorized and empowered to inspect the records of any clerk of the superior court in the State for the purpose of ascertaining that

such clerk is complying with the requirements of §§ 2-54 to 2-60 and if, in the course of such inspection, it is found that such clerk has failed to comply with the requirements of §§ 2-54 to 2-60, it shall be the duty of the Local Government Commission, or its successors, to report such findings to the solicitor of the district in which the county is located and said solicitor shall proceed to prosecute as hereinafter provided. (1931, c. 60; 1931, c. 281, s. 4.)

§ 2-58. Inspection and audit by county auditors or accountants; reports of audits.—It shall be the duty of the county auditor or county accountant of any county to inspect and audit the records and accounts of the clerk of the superior court of the county for the purpose of ascertaining that such clerk is complying with the requirements of §§ 2-54 to 2-60 and that such clerk is properly safeguarding and accounting for all funds of every nature and character which have come into his hands by virtue of his office; such audits to be made and a report thereof made by the county auditor or county accountant to the board of county commissioners of the county and to the Local Government Commission or such other governmental agency as shall succeed to the rights and duties of the Local Government Commission. (1931, c. 281, ss. 6, 60.)

§ 2-59. Liquidation of present funds within year.—It shall be the duty of the clerk of the superior court of any county in the State, who shall have funds invested other than as provided for in §§ 2-54 to 2-60 to liquidate same within one year from the passage of §§ 2-54 to 2-60: Provided, however, that upon approval of the resident judge of his district, the clerk may extend from time to time, the time for sale or collection of any such investments; that no one extension shall be made to cover a period of more than one year from the time the extension is made. (1931, c. 281, s. 7.)

§ 2-60. Violation of §§ 2-54 to 2-59 a misdemeanor.—The clerk of the superior court of any county in the State who shall have violated the provisions of §§ 2-54 to 2-59 shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of this court. (1931, c. 281, s. 5.)

Chapter 3.

Commissioners of Affidavits and Deeds.

Sec.

3-1. Appointment by Governor; term; oath.

3-2. Record of appointments; certified copies evidence.

3-3. List of appointments prepared and published by Secretary of State.

Sec.

3-4. Published list conclusive.

3-5. Powers of such commissioners.

3-6. Fees of commissioners of affidavits.

3-7. Powers of clerks of courts in other states.

3-8. Clerks and notaries to take affidavits.

§ 3-1. Appointment by Governor; term; oath.—The Governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the Governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace or clerk of a court of record in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the Secretary of State. (Code, ss. 632, 633; Rev., ss. 926, 927; C. S., s. 963; 1945, c. 635.)

Cross Reference.—For general provisions relating to proof and acknowledgment of instruments, and the taking of affidavits in other jurisdictions, see §§ 10-4, 47-2,

47-3, 47-6, 47-44, 47-45.

Editor's Note.—The 1945 amendment inserted in the second sentence the words "or clerk of a court of record."

§ 3-2. Record of appointments; certified copies evidence.—It is the duty of the Governor to cause to be recorded by the Secretary of State the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the Secretary of State, when the oath of the commissioner is filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the State, who shall record the certificate of the Secretary at length. All removals of commissioners by the Governor, and the names of all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner. A certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the Secretary of State, shall be sufficient evidence of the appointment or removal of such commissioner. (Code, s. 634; Rev., s. 928; C. S., s. 964.)

It is the duty of the Secretary of State forthwith upon the appointment of such commissioners, to certify the same to the several clerks of the superior courts of the State, and, in like manner, to certify to

the said clerks all removals of commissioners, and of all whose commissions have expired. *Evans v. Etheridge*, 99 N. C. 43, 5 S. E. 386 (1888).

§ 3-3. List of appointments prepared and published by Secretary of State.—The Secretary of State shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the state, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date

of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death. (Code, ss. 635, 636, 637, 639; Rev., s. 929; C. S., s. 965.)

§ 3-4. Published list conclusive.—The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof. (Code, s. 638; Rev., s. 930; C. S., s. 966.)

§ 3-5. Powers of such commissioners.—The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this State, and to take the private examination of married women, parties thereto, or any other writings to be used in this State. Such acknowledgment or proof, taken or made in the manner directed by the laws of this State, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this State. The commissioners also have full power and authority to administer an oath or affirmation to any person willing or desirous to make it before him, to take depositions, and to examine the witnesses under any commission emanating from the courts of this State, relating to any cause depending or to be brought in said courts. Every deposition, affidavit, or affirmation made before him is as valid as if taken before any proper officer in this State. (Code, ss. 632, 633; Rev., ss. 926, 927; C. S., s. 967.)

Cross Reference.—For repeal of laws requiring the private examination of married women, see § 47-14.1.

Editor's Note.—In *DeCourcy, etc., Co. v. Barr*, 45 N. C. 181 (1853), the court construed an early statute as empowering commissioners of affidavits to take the acknowledgments of nonresidents only. The law was changed soon after that decision was rendered, and it does not seem that any serious doubt has been entertained as to the true meaning of the law now in force since *Simmons v. Gholson*, 50 N. C. 401 (1858), was decided. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of executions or the acknowledgment of grantors, who may be in the state for which they were appointed (whether there temporarily or as residents), as to the execution of deeds conveying land or other property located in this State that are required or allowed by law to be registered. The clerk of the superior court of the county in which the land lies has power to adjudge that the execution has been properly proven and order the registration, while the commissioner is *functus officio*, as to any given deed, when he has attached to it his certificate as to proof or acknowledgment of its execution. *James, etc., Co. v. Pegram*, 102 N. C. 540, 9 S. E. 412 (1889), citing *Evans v. Etheridge*, 99 N. C. 43, 5 S. E. 386 (1888).

Scope of Commissioner's Authority.—Under the section commissioners of affidavits have full authority to take the acknowledgment, within the states for which

they are appointed, of the grantors to any deed or conveyance of lands in this State, and to take the private examination of *femes covert*. *James, etc., Co. v. Pegram*, 102 N. C. 540, 9 S. E. 412 (1889); *Maphis v. Pegram*, 107 N. C. 505, 12 S. E. 235 (1890).

Commissioners of affidavits are empowered by the section to take acknowledgments of deeds in other states, by residents of both this State and that for which such commissioners are appointed. *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

Acknowledgments of Residents Visiting in Another State.—Where a man and his wife, being residents of this State, duly acknowledged a deed before a commissioner in Virginia, where they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the superior court of the county in which the land was situated, and the deed duly recorded, the registration was valid. *James, etc., Co. v. Pegram*, 102 N. C. 540, 9 S. E. 412 (1889); *Maphis v. Pegram*, 107 N. C. 505, 12 S. E. 235 (1890).

Seal Unnecessary.—A commissioner of deeds for this State, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this State. *Johnson v. Duvall*, 135 N. C. 642, 47 S. E. 611 (1904); *Sluder v. Wolf Mountain Lumber Co.*, 181 N. C. 69, 106 S. E. 215 (1921).

Acknowledgment a Judicial Act.—In this State it is settled law that an acknowledgment of a deed by the husband and privy

examination of the wife taken before a commissioner is a judicial, or at least a quasi judicial, act. *DeCourcy, etc., Co. v. Barr*, 45 N. C. 181 (1853); *Long v. Crews*, 113 N. C. 256, 18 S. E. 499 (1893).

Sufficient Verification.—An affidavit up-

on which an application for a provisional remedy is based is sufficiently verified when made before a commissioner for this State resident in another state and authenticated by his official signature and seal. *Young v. Rollins*, 85 N. C. 485 (1881).

§ 3-6. Fees of commissioners of affidavits.—Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: for an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents. (Code, s. 3741; Rev., s. 2796; C. S., s. 3924.)

Cross Reference.—As to fees of notaries, see § 10-8.

§ 3-7. Powers of clerks of courts in other states.—Every clerk of a court of record in any other state has full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this State. (Code, s. 640; Rev., s. 931; C. S., s. 968.)

Cross Reference.—As to probate and registration by officials of the United States, foreign countries, and sister states, see §§ 47-2, 47-3, 47-44, 47-45.

Authority of Clerks to Act.—The section confers upon clerks of courts of record in other states the powers both of commis-

sioners of affidavits and of deeds and of commissioners regularly appointed by the courts, and the courts will take judicial notice of their seals. *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201 (1895); *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124 (1896).

§ 3-8. Clerks and notaries to take affidavits.—The clerks of the Supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the State; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notarial seal. (Code, s. 631; Rev., s. 925; C. S., s. 969.)

Judicial Notice of Seals.—Courts take judicial notice of the seal of the courts of other states, for the purpose of determining the validity of a verification of a pleading, just as they do of the seals of foreign courts of admiralty and notaries public. *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21

S. E. 201 (1895).

Verification of Pleadings before Clerk.—A verification of a pleading made before the clerk of the Hustings Court of Richmond, Virginia, and authenticated by his seal, is valid. *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201 (1895).

Chapter 4.

Common Law.

Sec.

4-1. Common law declared to be in force.

§ 4-1. **Common law declared to be in force.**—All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. (1715, c. 5, ss. 2, 3, P. R.; 1778, c. 133, P. R.; R. C., c. 22; Code, s. 641; Rev., s. 932; C. S., s. 970.)

General Considerations.—The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. Kent, Vol. 1, p. 471; *Kansas v. Colorado*, 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907).

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs, immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs. Black Law Dict., p. 232; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 S. Ct. 561, 45 L. Ed. 765 (1901).

The term "common law" refers to the common law of England and not of any particular state. *Eidman v. Martinez*, 184 U. S. 578, 22 S. Ct. 515, 46 L. Ed. 697 (1902).

So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. *State v. Mitchell*, 202 N. C. 439, 163 S. E. 581 (1932).

Extent of Common Law.—So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. *State v. Hampton*, 210 N. C. 283, 186 S. E. 251 (1936).

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C.

332, 38 S. E. (2d) 105 (1946); *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350 (1949); *Henson v. Thomas*, 231 N. C. 173, 56 S. E. (2d) 432, 12 A. L. R. (2d) 1171 (1949); *Friendly Finance Corp. v. Quinn*, 232 N. C. 407, 61 S. E. (2d) 192 (1950); *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73 (1950).

Vested Rights in Common Law.—A person has no property, no vested interest, in any rule of common law. *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232 (1884).

Reference to Debts Due to State Abrogated.—The English common law which gave a debt due to the sovereign a preference over the debts due to others, is abrogated by this section, and is not in force as applied to a debt due to this State. This on the principle that the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. *Corp. Com. v. Trust Co.*, 193 N. C. 513, 137 S. E. 587 (1927).

Right of Bail in Capital Cases.—At common law bail might be granted in capital cases only by a high judicial officer upon thorough scrutiny of the facts and great caution. This right though once modified by the old Constitution against its existence in capital offenses where the proof was evident and the presumption was great, now prevails in this State as it existed at common law, since that Constitution is superseded by the present Constitution which contains no provisions which qualify the right. In England the power to bail was exercised by the King's superior courts of justice; and in this State the power is conferred upon the justices of the Supreme Court, judges of the superior and criminal courts. *State v. Hernon*, 107 N. C. 934, 12 S. E. 268 (1890).

Exemption of Attorneys from Arrest.—The common law exemption of an attorney from arrest in a civil action, should, under our institutions and because of ab-

soluteness by nonusage, not prevail, except where the attorneys are actually in attendance upon court in the due course of their employment as attorneys. *Greenleaf v. Bank*, 133 N. C. 292, 45 S. E. 638 (1903).

The common-law rights and disabilities of husband and wife are in force in this State except in so far as they have been abrogated or repealed by statute. *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350 (1949).

Mediate Jury. — The statute, 28 Ed., III, ch. 13, in England, giving a jury de medietate, is not in force in this State. *State v. Antonio*, 11 N. C. 200 (1825).

Percolating Waters. — The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and the English common-law doctrine to the contrary is inapplicable under this section. *Rouse v. Kinston*, 188 N. C. 1, 123 S. E. 482 (1924).

Habeas Corpus.—It is an admitted principle of common law that every court of record of superior jurisdiction has the power to issue the writ of habeas corpus. This power is preserved in this State and can be exercised by all courts of record of superior jurisdiction. *In re Bryan*, 60 N. C. 1 (1863).

Forfeiture for felony, which was the established rule at common law, has had no force in this State since 1778. *White v. Fort*, 10 N. C. 251 (1824).

Exemption from Civil Process. — The common-law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this State, as suitors or witnesses, was not repealed by implication by §§ 8-64, 9-18. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947 (1898).

The common-law writ of error coram nobis to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857 (1949); *State v. Daniels*, 231 N. C. 17, 56 S. E. (2d) 2 (1949).

Survivorship; Husband and Wife Tenants by Entireties.—The common-law doctrine of survivorship between husband and wife as tenants by entireties has not been changed by statute and is in force in this State. *Dorsey v. Kirkland*, 177 N. C. 520, 99 S. E. 407 (1919).

Survival of Actions.—Since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute.

Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946).

Presumption as to Common Law in Sister States.—Where there is no evidence to the contrary, the presumption is that the common law is in force in a sister state. *Hipps v. Southern R. Co.*, 177 N. C. 472, 99 S. E. 335 (1919).

Presumption of Death. — The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. *Steele v. Metropolitan Life Insurance Co.*, 196 N. C. 408, 145 S. E. 787 (1928).

Limitation Over in Personal Property. —The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this State, under this section, and has been recognized by judicial decision and by statutory implication. *Speight v. Speight*, 208 N. C. 132, 179 S. E. 461 (1935).

Champerty is an offense at common law, and prevails in this State, being retained under this section. *Merrell v. Stuart*, 220 N. C. 326, 17 S. E. (2d) 458 (1941).

Barratry.—The common-law offense of barratry obtains in this State, since it has never been the subject of legislation in North Carolina and is not repugnant nor inconsistent with our form of government. *State v. Batson*, 220 N. C. 411, 17 S. E. (2d) 511, 139 A. L. R. 614 (1941).

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common-law rule being in effect and controlling. *State v. Hampton*, 210 N. C. 283, 186 S. E. 251 (1936).

Punishment When No Penalty Expressly Provided.—The common-law rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. *State v. Bishop*, 228 N. C. 371, 45 S. E. (2d) 858 (1947).

Implied Warranty in Sale of Food. — The common-law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the changes in the manner and method of the manufacture, preparation and distribution of food. *Rabb v. Covington*, 215 N. C. 572, 2 S. E. (2d) 705 (1939).

Applied in *Wells v. Guardian Life Ins. Co.*, 213 N. C. 178, 195 S. E. 394, 116 A.

L. R. 130 (1938); *State v. Sullivan*, 229 N. C. 251, 49 S. E. (2d) 458 (1948).

Cited in *Hinton v. Hinton*, 196 N. C. 341, 145 S. E. 615 (1928); *Rhodes v. Collins*, 198 N. C. 23, 150 S. E. 492 (1929);

Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933); *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858 (1944). See also, *Price v. Slagle*, 189 N. C. 757, 128 S. E. 161 (1925).

Chapter 5.

Contempt.

Sec.	Sec.
5-1. Contempts enumerated; common law repealed.	5-6. Courts and officers empowered to punish.
5-2. Appeal from judgment of guilty.	5-7. Indirect contempt; order to show cause.
5-3. Solicitor or Attorney-General to appear for the court.	5-8. Acts punishable as for contempt.
5-4. Punishment.	5-9. Trial of proceedings in contempt.
5-5. Summary punishment for direct contempt.	

§ 5-1. Contempts enumerated; common law repealed.—Any person guilty of any of the following acts may be punished for contempt:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

4. Willful disobedience of any process or order lawfully issued by any court.

5. Resistance willfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory.

7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.

8. Misbehavior of any officer of the court in any official transaction.

The several acts, neglects, and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there are any parts of the common law now in force in this State which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled. (Code, s. 648; 1905, c. 449; Rev., s. 939; C. S., s. 978.)

- I. General Consideration.
- II. Subdivision I.
- III. Subdivision II.
- IV. Subdivision IV.
- V. Subdivision V.
- VI. Subdivision VI.
- VII. Subdivision VII.
- VIII. Subdivision VIII.

I. GENERAL CONSIDERATION.

Editor's Note.—It is essential for an effective administration of justice in an or-

derly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905); *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621 (1922).

These powers, however, as they existed at common law, while they may not be

abrogated, may be reasonably regulated by legislation. See *In re Robinson*, 117 N. C. 533, 23 S. E. 453 (1895). Thus, this and the following sections are regulatory legislation upon the subject, and being in accord with modern doctrine, cannot be assailed on the ground of unconstitutionality. See *In re Oldham*, 89 N. C. 23 (1883); *In re Brown*, 168 N. C. 417, 84 S. E. 690 (1915).

The enumeration of the acts punishable for contempt under this section is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See *In re Odum*, 133 N. C. 250, 45 S. E. 569 (1903).

For discussions of the history, nature, and extent of the power of courts to punish for contempt, see *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905); *In re Brown*, 168 N. C. 417, 84 S. E. 690 (1915). See also 12 N. C. Law Rev. 260.

Construed Strictly.—This section should be strictly construed as a criminal statute. *West v. West*, 199 N. C. 12, 153 S. E. 600 (1930). See also *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

Definition.—Contempt is a willful disregard of the authority of a court of justice, or a legislative body or disobedience to its lawful orders. *Black Law Dict.*

Nature and Purpose of Proceedings.—Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey. See *In re Chiles*, 22 Wall. (89 U. S.) 157, 22 L. Ed. 819 (1874); *Bessette v. Conkey Co.*, 194 U. S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904).

Nature of Offense.—Criminal contempt is the commission of an act tending to interfere with the administration of justice, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, and the willful refusal to pay alimony as ordered by the court is civil contempt. *Dyer v. Dyer*, 213 N. C. 634, 197 S. E. 157 (1938).

Same—Jury Trial.—Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577 (1947).

Facts Must Be Found and Filed.—In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the

purpose and object of the contemnor, and the judgment must be founded on those findings. *In re Odum*, 133 N. C. 250, 45 S. E. 569 (1903).

Inherent Powers to Punish for Contempt.—This and the following sections regulating proceedings for contempt confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. *State v. Little*, 175 N. C. 743, 94 S. E. 680 (1917).

The power to punish for contempt is inherent in all courts. *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

Not Repugnant to Principle of Due Process.—Summary proceedings for contempt, in which there is no right of appeal or trial by jury or removal before another judge, are not within the constitutional prohibition contained in the due process clause. The power to punish summarily for contempt has existed at common law "as far as the annals of the law extend." *State v. Little*, 175 N. C. 743, 94 S. E. 680 (1917).

Cited in Vaughan v. Vaughan, 213 N. C. 189, 195 S. E. 351 (1938).

II. SUBDIVISION I.

Must Be in Presence of the Court.—A willful disobedience of the process or order of the superior court to desist from obstruction of a public road is not a contempt committed within the immediate presence or view of the court. *In re Parker*, 177 N. C. 463, 99 S. E. 342 (1919).

Nature of the Acts Punishable for Contempt.—Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough, designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business presently before it. *State v. Little*, 175 N. C. 743, 94 S. E. 680 (1917).

Protection Extended to Officers of Court, Witnesses, etc.—It is an act of contempt to interfere with the functioning of the business not only of the judge but also of all the officers of the court, and persons such as attorneys, jurors and witnesses, who in the line of their duty are assisting the court in the dispatch of its business. *State v. Little*, 175 N. C. 743, 94 S. E. 680 (1917); *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621 (1922).

Assaulting Judge during Recess of Court.—Where the respondent visited the judge

at his boardinghouse during a recess of the court, before the adjournment of the term and assaulted the judge, it was held that this conduct was a direct contempt of the court as much as if the assault had been committed in the court during trial. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905).

Appeal.—Actions of judge in respect to contempts committed in the presence of the court are not reversible on appeal except for gross abuse of discretion. See *Ex parte Biggs*, 64 N. C. 202 (1870); *In re Davis*, 81 N. C. 72 (1879); *State v. Nowell*, 156 N. C. 648, 72 S. E. 590 (1911). As to contempts not committed in the presence of the court, however, an appeal lies. *In re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890).

Fighting in Courthouse Yard.—In *State v. Woodfin*, 27 N. C. 199 (1844), fighting in the yard of the courthouse, before the courthouse door, constituted the basis of the offense of contempt.

III. SUBDIVISION II.

Punishment by Court Making the Reference.—When, in the course of supplementary proceedings before a referee, a contempt is committed by refusing to answer the questions, it must be punished by the court making the reference. *LaFontaine v. Southern Underwriters*, 83 N. C. 133 (1880).

IV. SUBDIVISION IV.

Cross References.—As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368. As to acts punished as for contempt, see §§ 5-8, 5-9.

“Wilful” and “Unlawful” Distinguished.—“The word ‘wilful,’ when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law.” “The term ‘unlawfully’ implies that an act is done, or not done as the law allows, or requires; while the term ‘wilfully’ implies that the act is done knowingly and of stubborn purpose.” *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934), citing *West v. West*, 199 N. C. 12, 153 S. E. 600 (1930).

Failure to obey a court order cannot be punished for contempt unless the disobedience is wilful, which imports knowledge and a stubborn purpose. *Lamm v. Lamm*, 229 N. C. 248, 49 S. E. (2d) 403 (1948).

Where defendant testifies that his failure after knowledge to obey a court order for the payment of alimony pendente lite

was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant’s explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court’s finding that defendant willfully disobeyed the order is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside. *Lamm v. Lamm*, 229 N. C. 248, 49 S. E. (2d) 403 (1948).

Refusal to Deliver Note.—In *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620 (1887), it was held that a refusal to obey the order requiring the surrender of a note, whether amounting to contempt or not, warranted a commitment as a means of forcing a compliance.

Disavowal of Disrespectful Intent.—The wilful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt under this section, from which he may not purge himself by disavowing a disrespectful intent. *In re Parker*, 177 N. C. 463, 99 S. E. 342 (1919).

Impossibility to Comply with the Order or Process.—Where the disobedience to the process or order is due to circumstances which make it impossible for the contemnor to obey such an order or process, he may not be punished for contempt. Thus where the clerk issued a notice to the respondent to produce a certain will which was in the custody of some other clerk, it was held the order to adjudge the respondent guilty of contempt was reversible on appeal. *In re Scarborough Will*, 139 N. C. 423, 51 S. E. 931 (1905). But where the impossible circumstances are removed prior to the arrest for contempt the defendant will not be excused. *Shooting Club v. Thomas*, 120 N. C. 334, 26 S. E. 1007 (1897). The excuse is sufficient where the defendant has been unable to pay money according to an order. *Kane v. Haywood*, 66 N. C. 1 (1872); *Boyett v. Vaughan*, 89 N. C. 27 (1883); *Smith v. Smith*, 92 N. C. 304 (1885).

Where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was wilful, and he may not be adjudged in contempt of court and

a sentence imposed upon him. West v. West, 199 N. C. 12, 153 S. E. 600 (1930).

Failure to Pay Alimony, etc.—Upon the hearing of an order to show cause why defendant should not be attached for contempt for failure to pay alimony and counsel fees as required by the prior judgment, defendant pleaded his inability to pay. The court found defendant had earned \$140.00 since the original order, and adjudged defendant to be in contempt and the judgment for contempt was not dated and fails to show the length of time during which defendant earned the sum stated, and fails to find any facts on the defendant's plea of disavowal, the record and findings are insufficient to support a judgment for contempt for "wilful disobedience" of a court order. *Berry v. Berry*, 215 N. C. 339, 1 S. E. (2d) 871 (1939).

The mere fact that defendant, ordered to pay a certain sum monthly for the necessary subsistence of his wife and child, has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is wilful. *Smithwick v. Smithwick*, 218 N. C. 503, 11 S. E. (2d) 455 (1940).

An order of court not "lawfully issued" may not be the basis on which to found a proceeding for contempt. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. (2d) 658 (1949); *Greensboro v. Black*, 232 N. C. 154, 59 S. E. (2d) 621 (1950).

Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one "lawfully issued" as provided by this section. *In re Longley*, 205 N. C. 488, 171 S. E. 788 (1933).

Upon application for custody of children after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. (2d) 658 (1949).

Where a subpoena issued by a municipal-county court and running outside the county is a nullity because not attested by the seal of the court, neither service of the

process nor voluntary appearance thereunder, can waive the defect or vitalize the process so as to make the willful disobedience of the subpoena a basis for contempt proceedings. *State v. Black*, 232 N. C. 154, 59 S. E. (2d) 621 (1950).

Temporary Restraining Orders.—A court has inherent power, necessary to the maintenance of judicial authority, to punish as for contempt the willful violation of its orders, including temporary restraining orders. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577 (1947).

Failure to Comply with Separation Agreement.—Husband could not be adjudged in contempt for failure to comply with separation agreement entered into prior to the institution of divorce action, judgment in which provided that it should not affect or invalidate the separation agreement. *Brown v. Brown*, 224 N. C. 556, 31 S. E. (2d) 529 (1944).

Advice of Counsel No Excuse.—The failure to obey the order of the court placing property in possession of a receiver is, under this clause, a direct contempt, even though the contemnor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834 (1898). In such a case the counsel himself may be subjected to contempt proceedings. This fact, however, will be considered by the judge in imposing the punishment. *Weston v. Roper Lumber Co.*, 158 N. C. 270, 73 S. E. 799 (1912). See *Green v. Griffin*, 95 N. C. 50 (1886).

Disobeying Order of Clerk.—Where, in supplementary proceedings, the defendant has willfully disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court under the provisions of this section. *Bank v. Chamberlee*, 188 N. C. 417, 124 S. E. 741 (1924).

Must Be Able to Obey.—The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse—for example payment of money. *Kane v. Haywood*, 66 N. C. 1 (1872); *Boyett v. Vaughan*, 89 N. C. 27 (1883); *Smith v. Smith*, 92 N. C. 304 (1885).

Other Actions Held to Constitute Contempt.—Disobeying an injunction or restraining order such as cutting timber after injunction against the same. *Fleming v. Patterson*, 99 N. C. 404, 6 S. E. 396 (1888); *In re Carolina R. Co.*, 151 N. C. 467, 66 S. E. 438 (1909); *Weston v. Roper*

Lumber Co., 158 N. C. 270, 73 S. E. 799 (1912). Failure to pay alimony, *Zimmerman v. Zimmerman*, 113 N. C. 433, 18 S. E. 334 (1893). Failure of clerk to make transcript of record, *Worth v. Bank*, 121 N. C. 343, 28 S. E. 488 (1897). See also generally *Murray v. Berry*, 113 N. C. 46, 18 S. E. 78 (1893). Failure to deliver property, *McLean v. Douglass*, 28 N. C. 233 (1846). Failure to return process, *Ex parte Summers*, 27 N. C. 149 (1844). Failure to settle estates by public administrator, *In re Brinson*, 73 N. C. 278 (1875).

Applied in *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937).

V. SUBDIVISION V.

Willfully Preventing Receiver from Taking Possession.—A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him. *Nobles v. Roberson*, 212 N. C. 334, 193 S. E. 420 (1937).

VI. SUBDIVISION VI.

Commissioner May Ask Aid of Judge; Declaration of Power.—The commissioner before whom the witness had refused to answer, may invoke the aid of the judge to punish for contempt. But the judge has no right to delegate the judicial power to punish for contempt to an executive officer. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893).

Self-Incrimination No Defense.—Witness may not refuse to answer on the ground that his answer may tend to incriminate him. *LaFontaine v. Southern Underwriters*, 83 N. C. 133 (1880).

Other Actions Held to Constitute Contempt.—Refusal to testify before a commissioner, *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893). Refusal to testify before a referee, *LaFontaine v. Southern Underwriters*, 83 N. C. 133 (1880).

VII. SUBDIVISION VII.

In General.—To state that the judges of the Supreme Court singly or en masse moved from the path of judicial propriety because of political zeal, subjected the party so stating to liability under this clause of the section. *In re Moore*, 63 N. C. 396 (1869).

Publication after Adjournment of Court.—For constructive contempt by publication of false matter relating to the conduct of the presiding judge, published after the adjournment of the court, the judge must seek redress by the ordinary method and bring his cause before an impartial tribunal. He may not proceed to determine the matter summarily without the intervention of a jury. *In re Brown*, 168 N. C. 417, 84 S. E. 690 (1915).

Publication of Past Matter.—There no longer exists the power to punish summarily for defamatory reports and publications about a matter which is past and ended. To justify contempt proceedings the publication must have been *pendente lite*. *In re Brown*, 168 N. C. 417, 84 S. E. 690 (1915).

Trial of Issue by the Court Instead of the Jury.—If on the face of the publication there is nothing to show that it was grossly incorrect or calculated to bring the court into contempt, the respondent is entitled to have the issue tried not by a jury but by a court. *In re Robinson*, 117 N. C. 533, 23 S. E. 453 (1895).

Cited in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850 (1942).

VIII. SUBDIVISION VIII.

Cross References.—As to contempt in failure of personal representative to file account, see § 28-118. As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368. As to acts punished as for contempt, see §§ 5-8, 5-9.

Gross negligence of attorneys is a sort of contempt, and courts may order them to pay the costs of cases in which they are guilty of such negligence. *Ex parte Robins*, 63 N. C. 310 (1869).

Cited in *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163 (1940).

§ 5-2. **Appeal from judgment of guilty.**—Any person adjudged guilty of contempt under the preceding section has the right to appeal to the Supreme Court in the same manner as is provided for appeals in criminal actions, except for the contempts described and defined in subsections one, two, three, and six. Nor shall the right of appeal lie under subsections four and five if such contempt

is committed in the presence of the court. (Code, s. 648; 1905, c. 449; Rev., s. 939; C. S., s. 979.)

Cross Reference.—As to appeals in criminal actions, see § 15-180 et seq.

Finding of Fact Not Disturbed.—Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, the finding will not be disturbed by appeal. In re Deaton, 105 N. C. 59, 11 S. E. 244 (1890); State v. Little, 175 N. C. 743, 94 S. E. 680 (1917). Nor will the finding of fact by the judge be disturbed upon an appeal on an indirect contempt. In re Parker, 177 N. C. 463, 99 S. E. 342 (1919).

It is otherwise however on appeals from a subordinate court to the superior court. In such a case the facts as well as the law will be reviewed, and even additional

testimony may be heard. In re Deaton, 105 N. C. 59, 11 S. E. 244 (1890).

Habeas Corpus and Not Appeal.—Where the defendant, punished for direct contempt, contends that his legal rights have been denied, and it is made to appear that the court had no jurisdiction, his remedy is not by appeal, but by habeas corpus proceedings which, if necessary, may be carried up by a writ of certiorari. State v. Little, 175 N. C. 743, 94 S. E. 680 (1917).

As to contempts not committed in the presence of the court, an appeal lies. In re Davis, 81 N. C. 72 (1879); In re Walker, 82 N. C. 95 (1880); Cromartie v. Commissioners, 85 N. C. 211 (1881); In re Deaton, 105 N. C. 59, 11 S. E. 244 (1890).

§ 5-3. Solicitor or Attorney General to appear for the court.—In all cases where a rule for contempt is issued by any court, referee, or other officer, the solicitor shall appear for the court or other officer issuing the rule, and in case of appeal to the Supreme Court, the Attorney General shall appear for the court or other officer by whom the rule was issued. (Code, s. 648; 1905, c. 449; Rev., s. 939; C. S., s. 980.)

§ 5-4. Punishment.—Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court. (Code, s. 649; Rev., s. 940; C. S., s. 981.)

Illegal Punishment.—Imprisonment for 60 days and a fine of \$2000 were held illegal under this section. In re Patterson, 99 N. C. 407, 6 S. E. 643 (1888). See also In re Walker, 82 N. C. 95 (1880).

Imprisonment for Debt.—The abolishment of imprisonment for debt does not include commitment under attachments for failure to comply with an order of court. Wood v. Wood, 61 N. C. 538 (1868).

Punishment for civil contempt is not limited to thirty days' imprisonment, this section not being applicable to civil contempt, and a petition for release from imprisonment for willful refusal to pay alimony on the ground that the court exceeded its authority in not limiting the imprisonment to thirty days, is properly refused, but defendant need not serve indefinitely and may obtain his discharge upon a proper showing under appropriate proceedings. Dyer v. Dyer, 213 N. C. 634, 197 S. E. 157 (1938).

Commitment until Alimony Paid.—A judgment for commitment until alimony is paid was held valid. Green v. Green, 130 N. C. 578, 41 S. E. 784 (1902).

Imprisonment until the order is complied with is valid. Cromartie v. Commissioners, 85 N. C. 211 (1881); Thompson v. Onley,

96 N. C. 9, 1 S. E. 620 (1887); Delozier v. Bird, 123 N. C. 689, 31 S. E. 834 (1898).

A fine for contempt goes to the State, being a punishment for a wrong to the State, and should not be directed to be paid to a party to the suit. In re Rhodes, 65 N. C. 518 (1871); Morris v. Whitehead, 65 N. C. 637 (1871).

Punishment by Working on Road.—A person sentenced to jail as for contempt of court cannot be worked on the roads. State v. Moore, 146 N. C. 653, 61 S. E. 463 (1908).

Punishment Immediate.—The punishment in contempt cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. State v. Yancy, 4 N. C. 133 (1814).

No Defense to Criminal Prosecution.—The fact that a person has been punished for contempt of court, is no defense to a criminal indictment for the act constituting the contempt. State v. Yancy, 4 N. C. 133 (1814); In re Griffin, 98 N. C. 225, 3 S. E. 515 (1887).

Power of Industrial Commission.—The Industrial Commission proceeding under the Workmen's Compensation Act, being expressly given the authority to subpoena

witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and has

power to punish by a fine or imprisonment under the provisions of this section. In *re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931).

§ 5-5. Summary punishment for direct contempt.—Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order. (Code, s. 650; Rev., s. 941; C. S., s. 982.)

Remedy by Habeas Corpus.—This section, providing that the court shall find the facts constituting the contempt and have them spread upon the record, does not have the effect of giving the right to an appeal nor to a writ of certiorari in direct contempts. But such facts when spread upon the record may authorize a revising tribunal, on a habeas corpus, to discharge the party. In *re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890).

Jury Trial.—It is well settled that the

defendant in contempt proceedings is not entitled to a jury trial upon the controverted facts. In *re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890).

Assaulting Judge during Adjournment.—For assaulting a judge in his house pending an adjournment of the court the petitioner was properly punished for contempt by attachment in summary proceedings. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905).

§ 5-6. Courts and officers empowered to punish.—Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the Supreme Court, or board of commissioners of each county, or the Utilities Commission, or member of the Industrial Commission, has power to punish for contempt while sitting for the trial of causes or engaged in official duties. (Code, ss. 651, 652; Rev., s. 942; C. S., s. 983; 1933, c. 134, s. 8; 1941, c. 97; 1945, c. 533.)

Editor's Note.—The 1945 amendment inserted the words "or member of the Industrial Commission."

Authority of Mayor to Punish.—The authority given under this section to a justice of the peace to punish for contempt is extended to mayors by §§ 160-13, 160-14. In *re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890); *State v. Aiken*, 113 N. C. 651, 18 S. E. 690 (1893).

Referee.—Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. *LaFontaine v. Southern Underwriters*, 83 N. C. 133 (1880).

Authority of Commissioner Not Exclusive.—The power of a commissioner, appointed by the court, to commit for refusal

to testify is not given exclusively, if at all; but he may invoke the power of the judge, even though he may be given concurrent authority, under statute. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893).

A judge of the district court has no authority, except in his own district, to punish for contempt. In *re Rhodes*, 65 N. C. 518 (1871); *Morris v. Whitehead*, 65 N. C. 637 (1871).

Nisi Prius Judge.—The right of a nisi prius judge to order a witness or anyone else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. *State v. Dick*, 60 N. C. 440 (1864); *State v. Ownby*, 146 N. C. 677, 61 S. E. 630 (1908); *State v. Swink*, 151 N. C. 726, 66 S. E. 448 (1909).

§ 5-7. Indirect contempt; order to show cause.—When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter. (Code, s. 653; Rev., s. 943; C. S., s. 984.)

Practice.—In the cases of contempts out to have a foundation laid by facts shown of the presence of the court the practice is forth, by affidavit or otherwise, constitut-

ing a prima facie case, and then by a rule to put the accused to show cause against the attachment by an answer denying the alleged facts of which he had notice in the rule or on the record, or excusing his conduct, or, where the gravamen of the charge

rested on intention, by a disavowal of the imputed purpose. In *re Moore*, 63 N. C. 396 (1869); In *re Walker*, 82 N. C. 95 (1880).

Cited in *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163 (1940).

§ 5-8. Acts punishable as for contempt.—Every court of record has power to punish as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

1. Any clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed, or prejudiced, for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

2. Parties to suits, attorneys, and all other persons for the nonpayment of any sum of money ordered by such court, in cases where execution cannot be awarded for the collection of the same.

3. All persons for assuming to be officers, attorneys or counselors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

4. All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

5. Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom.

6. All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

7. All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this State to enforce the civil remedies or protect the rights of any party to an action. (Code, ss. 654, 656; Rev., s. 944; C. S., s. 985.)

Cross References.—As to punishment for using profanity within hearing of justice of peace, see § 7-128. As to punishment of witness refusing to testify in action against a railroad before a justice of peace, see § 7-146.

Editor's Note.—See 12 N. C. Law Rev., 260, for comment on this and other sections dealing with contempt.

For a discussion of this section and its relation to the preceding sections, see *Cromartie v. Commissioners*, 85 N. C. 211 (1881).

Applicable to Civil Actions.—The provisions of this section, except subsections 4, 5, and 6, apply only to civil actions. In *re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890).

Jury Trial.—Respondents in proceedings as for contempt are not entitled to a jury trial. In *re Gorham*, 129 N. C. 481, 40

S. E. 311 (1901).

Persuading Witness.—Where a defendant in a criminal action tried to persuade the State's witness to leave the State and not to appear against him, it was held that he was subject to proceedings as for contempt. In *re Young*, 137 N. C. 552, 50 S. E. 220 (1905).

Refusal to effectuate an agreement to sign a consent judgment may not be made the basis for contempt proceedings by this section where it does not appear that the parties ever agreed to the exact terms of such judgment. *State v. Clark*, 207 N. C. 657, 178 S. E. 119 (1935).

Under clause 3 a person may be punished as for contempt, for unlawful interference with proceedings in any action. In *re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901).

Suggesting to Witness Not to Attend.—

Suggesting to a material witness not to attend court, etc., with apparent intent to prevent the attendance of the witness, is under this clause an unlawful interference with the process and proceedings of the court. *State v. Moore*, 146 N. C. 653, 61 S. E. 463 (1908).

Juror Improperly Influenced. — Under

subsection 5 a juror may be punished as for contempt for allowing himself to be improperly influenced. *In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901).

Applied.—*Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893).

Cited in *Dyer v. Dyer*, 213 N. C. 634, 197 S. E. 157 (1938).

§ 5-9. **Trial of proceedings in contempt.**—Proceedings as for contempt shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action. (Code, s. 655; Rev., s. 945; 1915, c. 4; C. S., s. 986; 1947, c. 781.)

Editor's Note.—The 1947 amendment rewrote the first sentence.

Chapter 6.

Costs.

Article 1. Generally.

- Sec.
6-1. Items allowed as costs.
6-2. Summary judgment for official fees.
6-3. Sureties on prosecution bonds liable for costs.
6-4. Execution for unpaid fees; itemized bill of costs to be annexed.
6-5. Jurors' tax fees.
6-6. In criminal cases, not demandable in advance.
6-7. Clerk to state in detail in entry of judgment.
6-8. Clerk to itemize bills of criminal costs; approval of solicitor.
6-9. Justice required to itemize costs.
6-10. Justice of the peace refusing to furnish bill of costs.
6-11. Bills of costs open to the public.
6-12. Clerks to tax solicitors' fees; paid to school fund.

Article 2.

When State Liable for Costs.

- 6-13. Civil actions by the State; joinder of private party.
6-14. Civil action by and against State officers.
6-15. Actions by State for private persons, etc.
6-16. Costs of county in certain bribery prosecutions to be a charge against State.
6-17. Costs of State on appeals to federal courts.

Article 3.

Civil Actions and Proceedings.

- 6-18. When costs allowed as of course to plaintiff.
6-19. When costs allowed as of course to defendant.
6-20. Costs allowed or not, in discretion of court.
6-21. Costs allowed either party or apportioned in discretion of court.
6-22. Petitioner to pay costs in certain cases.
6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.
6-24. Suits in forma pauperis; no costs unless recovery.
6-25. Party seeking recovery on usurious contracts; no costs.
6-26. Costs in special proceedings.

Sec.

- 6-27. Fees and disbursements in supplemental proceedings.
6-28. Costs of laying off homestead and exemption.
6-29. Costs of reassessment of homestead.
6-30. Costs against infant plaintiff; guardian responsible.
6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.
6-32. Costs against assignee after action brought.

Article 4.

Costs on Appeal.

- 6-33. Costs on appeal generally.
6-34. Costs of transcript on appeal taxed in Supreme Court.
6-35. Costs on appeal from justices of the peace.

Article 5.

Liability of Counties in Criminal Actions.

- 6-36. County to pay costs in certain cases; if approved, audited and adjudged.
6-37. Local modification as to counties paying costs.
6-38. Liability of county when defendant acquitted in Supreme Court.
6-39. County where offense committed liable for costs.
6-40. Liability of counties, where trial removed from one county to another.
6-41. Statement of costs against county to be filed with commissioners.
6-42. Expenses in conveying prisoner to another county; provision for payment.
6-43. Cost of investigating lynchings.
6-44. Costs due credited on taxes due by payee.

Article 6.

Liability of Defendant in Criminal Actions.

- 6-45. Costs against defendant convicted, confessing, or submitting.
6-46. Defendant imprisoned not discharged until costs paid.
6-47. Judgment confessed; bond given to secure fine and costs.
6-48. Arrest for nonpayment of fine and costs.

Article 7.

Liability of Prosecutor for Costs.

- 6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.

Sec.

6-50. Imprisonment of prosecutor for non-payment of costs, if prosecution frivolous.

Article 8.

Fees of Witnesses.

6-51. Not entitled to fees in advance.

6-52. Fees and mileage of witnesses.

6-53. Witness to prove attendance; action for fees.

6-54. Witness tickets to be filed; only two witnesses for single fact.

6-55. Fees of witnesses before jury of view, commissioner, etc.

6-56. Fees of witnesses before grand jury.

6-57. [Repealed.]

6-58. County to pay State's witnesses in certain cases.

6-59. County to pay defendant's witnesses in certain cases.

Sec.

6-60. Fees of State witnesses; two only in misdemeanors; one fee for day's attendance.

6-61. On appeal from justice only two witnesses bound over.

6-62. Solicitor to announce discharge of State's witnesses.

6-63. Witnesses not paid without certificate; court's discretion.

Article 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

6-64. Liability for criminal costs before justice, mayor, county or recorder's court.

6-65. Imprisonment of defendant for non-payment of fine and costs.

ARTICLE 1.

Generally.

§ 6-1. **Items allowed as costs.**—To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same. (Code, s. 528; Rev., s. 1249; C. S., s. 1225.)

Cross References.—As to prosecution bonds for costs, see § 1-109 et seq. As to partial recovery, see § 6-18 and note. As to fees of witnesses, see § 6-51 et seq. and notes.

Editor's Note.—In general this section states the rule that costs follow the judgment, a rule which is founded on policy and natural justice, designed to prevent the unsuccessful litigant from escaping the consequence ensuing from the unfavorable termination of a suit, and which, to a great extent, acts as deterrent to the prosecution or appeal of promiscuous and frivolous litigation. Criminal actions and civil suits alike are controlled by the principle. In *State v. Horne*, 119 N. C. 853, 26 S. E. 36 (1896), it is said: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. *Kincaid v. Graham*, 92 N. C. 154 (1885); *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790 (1905); *Smith v. Lumber Co.*, 148 N. C. 334, 62 S. E. 416 (1908); *Kinston Cotton Mills v. Rocky Mount Hosiery Mills*, 154 N. C. 462, 70 S. E. 910 (1911); *Ritchie v. Ritchie*, 192 N. C. 538, 135 S. E. 458 (1926).

This basic rule of costs is underlying

throughout and apparent from the other provisions of this chapter, and, as stated in *Costin v. Baxter*, 29 N. C. 111 (1846), "in no instance found in the books has the losing party recovered his costs or any part of them."

For discussion of costs generally, see *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889).

Dependent upon Statutes.—At common law neither party to a civil action could recover costs. *Costin v. Baxter*, 29 N. C. 111 (1846); *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889); *Chadwick v. Life Ins. Co.*, 158 N. C. 380, 74 S. E. 115 (1912); *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182 (1919). And it has been frequently held that costs are entirely creatures of legislation, without which they do not exist. *Clerk's Office v. Commissioners*, 121 N. C. 29, 27 S. E. 1003 (1897).

The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, etc., is and always has been within the regulation and control of the legislature. See *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897).

Jurisdiction Essential.—Where a court has no jurisdiction of a case, it cannot award costs, or order execution to issue for them. See *Mansfield, etc., R. Co. v.*

Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

This section does not include expenses for returning defendants to this State from points without the State. *State v. Patterson*, 224 N. C. 471, 31 S. E. (2d) 380 (1944).

Expense of Transporting Witnesses.—A provision in an order for removal that movant should pay “costs” of transporting the witnesses of the adverse party, held to mean “expense,” since such “costs” are no part of the costs of the action. *Nichols v. Goldston*, 231 N. C. 581, 58 S.

E. (2d) 348 (1950).

An action upon a contract sounding in damages is one at law, and the costs are taxable under this section, and are not in the discretion of the court as an equity proceeding controlled by § 6-20. *Cotton Mills v. Knitting Co.*, 194 N. C. 80, 138 S. E. 428 (1927).

Where the Supreme Court allows improvements claimed in partition proceedings, claimant is not to be taxed with the costs of trial in the superior court involving her claim. *Jenkins v. Strickland*, 214 N. C. 441, 199 S. E. 612 (1938).

§ 6-2. Summary judgment for official fees.—If any officer, to whom fees are payable by any person, fails to receive them at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days’ notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed. If the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term. (1868-9, c. 279, s. 561; Code, s. 3760; Rev., s. 1250; C. S., s. 1226.)

Advance Fees for Docketing Transcript.—This section impliedly authorizes the clerk of the Supreme Court to refuse to docket the transcript when the prescribed fee is not paid in advance. Section 138-2 specifically authorizes the refusal. *Andrews v. Whisnant*, 83 N. C. 446 (1880); *Dunn v. Clerk’s Office*, 176 N. C. 50, 96 S. E. 738 (1918).

When Cause Is Still Pending.—This section is not applicable to the claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report. *Farmers Bank v. Merchants & Farmers Bank*, 204 N. C. 378, 168 S. E. 221 (1933).

Time of Motion to Re-Tax.—This section permits a motion to re-tax costs to be made in favor of any officer within one year after termination of the action. In

re *Smith*, 105 N. C. 167, 10 S. E. 982 (1890).

Judgment Becomes a Lien.—A judgment under this section becomes a lien on the lands of the defendants. *Sheppard v. Bland*, 87 N. C. 163 (1882).

Where, as a condition of a continuance, the plaintiff in an action was required to pay the accrued costs and they were taxed, docketed and paid, and a judgment was subsequently entered in the action directing the repayment of such costs by the defendant, it was held, that such costs became a part of the judgment already ascertained by reference to the docket as for so much money paid by the plaintiff for the defendant’s benefit, and hence, there was no necessity for a re-taxation of the costs. *Owen v. Paxton*, 122 N. C. 770, 30 S. E. 343 (1898).

§ 6-3. Sureties on prosecution bonds liable for costs.—When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety. (1831, c. 46; R. S., c. 31, s. 133; R. C., c. 31, s. 126; Code, s. 543; Rev., s. 1251; 1913, c. 189, s. 1; C. S., s. 1227.)

Cross References.—As to use of mortgages in lieu of security for costs, etc., see § 109-25. As to appeal bonds, see § 1-297.

Applies to Judgment for Defendant.—The section is so broadly worded as to apply to all cases where the costs are adjudged for the defendant against the plaintiff, and not simply to those where the plaintiff appeals. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 82 S. E.

849 (1914).

Applies in Supreme Court.—This section cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the superior court, or in the Supreme Court if an action is brought there against the State, or perhaps in some

other cases not cognizable by a justice of the peace. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 82 S. E. 849 (1914); *Grimes v. Andrews*, 171 N. C. 367, 88 S. E. 513 (1916).

The words "appellate court," as used by the amendment of this section in 1913, in view of the context could mean only the Supreme Court. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 82 S. E. 849 (1914).

The words "security for the prosecution" mean the prosecution bond. *Kenney v. Seaboard Air Line Railway Co.*, 166 N. C. 566, 82 S. E. 849 (1914).

Increasing Penalty of Bond.—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. *Kenney v. Seaboard Air Line Railway Co.*, 166 N.

C. 566, 82 S. E. 849 (1914).

Partial New Trial.—This section does not apply where the defendant does not gain an entire reversal in the Supreme Court; where a partial new trial only is awarded the costs are in the discretion of the Supreme Court as provided in § 6-33. *Rayburn v. Casualty Company*, 142 N. C. 376, 55 S. E. 296 (1906).

Application.—Where an action is brought to recover fees of an office, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. *McCall v. Zachary*, 131 N. C. 466, 42 S. E. 903 (1902).

Appeal.—Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. *Smith v. Arthur, etc., Co.*, 116 N. C. 872, 21 S. E. 696 (1895).

§ 6-4. Execution for unpaid fees; itemized bill of costs to be annexed.—The clerks of the Supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the State, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words so as plainly to show each item of costs and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued. (R. C., c. 102, s. 24; Code, s. 3762; Rev., s. 1252; C. S., s. 1228.)

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the exist-

ence of the other. *Sheppard v. Bland*, 87 N. C. 163 (1882).

§ 6-5. Jurors' tax fees.—On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars unless a different jury tax is prescribed elsewhere. In every civil action in any court of record for which different jury taxes are not prescribed by law the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending the courts thereof. (1830, c. 1; R. C., c. 28; 1879, c. 325; 1881, c. 249; Code, s. 732; 1905, c. 348; Rev., s. 1253; 1909, c. 1; 1919, c. 319; C. S., s. 1229; 1945, c. 635.)

Local Modification.—Harnett: 1933, c. 75, s. 1(c); Wayne: 1927, c. 156; 1937, c. 120; 1941, c. 88.

Cross References.—As to fees of jurors, see § 9-5. As to unclaimed fees of jurors, see § 2-50.

Editor's Note.—The 1945 amendment inserted the words "unless a different jury tax is prescribed elsewhere" at the end of the first sentence. It also inserted in the

second sentence the words "for which different jury taxes are not prescribed by law."

Not a "Tax" within Meaning of Constitution.—The tax prescribed by Rev. Code, ch. 28, § 4, (similar to this section) was not a tax within the meaning of the Revenue Act of 1858-59, which repealed all taxes not therein imposed; nor was it a tax within the meaning of the Constitu-

tion, Art. V, § 3, which requires taxes to be equal and uniform. Such a tax was not in violation of the Constitution, Art. I, § 35. *State v. Nutt*, 79 N. C. 263 (1878).

Failure to List Taxes.—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent and meaning of this section requiring in criminal cases a tax of \$4 against the “party convicted or adjudged to pay the cost,” and applies

whether the jury has been impaneled or not; and the tax of \$5 in the civil actions should be imposed as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, is immaterial in construing the meaning of the statute. *State v. Smith*, 184 N. C. 728, 114 S. E. 625 (1922).

§ 6-6. In criminal cases, not demandable in advance.—In all cases of criminal complaints before justices of the Supreme Court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process are not entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable. (1868-9, c. 178, subch. 3, s. 40; Code, s. 1173; Rev., s. 1254; C. S., s. 1230.)

Cross Reference.—As to costs payable in advance in civil actions, see § 2-29.

§ 6-7. Clerk to state in detail in entry of judgment.—The clerk shall insert in the entry of judgment the allowances for costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. When it is necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge. (Code, s. 532; Rev., s. 1255; C. S., s. 1231.)

In General.—In *Young v. Connelly*, 112 N. C. 646, 17 S. E. 424 (1893), the court cites this section to the following statement: “The referee’s fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor.”

Costs Properly Adjudged after Decision of Supreme Court.—After decision of the Supreme Court modifying and affirming a judgment of the superior court on appeal from the referee allowances constituting items of costs may be adjudged as provided by this section. *Clark v. Cagle*, 226 N. C. 230, 37 S. E. (2d) 672 (1946).

§ 6-8. Clerk to itemize bills of criminal costs; approval of solicitor.—It is the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk and approved by the solicitor. (1873-4, c. 116; 1879, c. 264; Code, s. 733; Rev., s. 1256; C. S., s. 1232.)

Local Modification.—Harnett: 1933, c. 75, s. 3.

§ 6-9. Justice required to itemize costs.—In all trials before justices of the peace any party, plaintiff or defendant, may demand of the justice of the peace before whom the trial is held an itemized statement of the costs of the action. Upon such demand it shall be the duty of the justice to furnish the statement demanded. No person shall be compelled to pay any cost in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged. It shall be the duty of the justice to insert in the entry of the judgment in every criminal action tried or other-

wise disposed of by him a detailed statement of the different items of cost, and to whom due. (Code, s. 734; 1887, c. 297; Rev., ss. 1257, 2789; C. S., s. 1233.)

Cross Reference.—As to fees and costs in appeal from justices of the peace, see § 7-181.

§ 6-10. Justice of the peace refusing to furnish bill of costs.—If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (Code, s. 734; 1887, c. 297; Rev., s. 3588; C. S., s. 1234.)

§ 6-11. Bills of costs open to the public.—Every bill of costs shall at all times be open to the inspection of any person interested therein. (1873-4, c. 116; Code, s. 735; Rev., s. 1258; C. S., s. 1235.)

§ 6-12. Clerks to tax solicitors' fees; paid to school fund.—The clerks of the superior courts of the several counties of the State shall, in computing bills of costs in criminal cases, tax against the party convicted the solicitors' fees hereinafter set forth. The solicitors' fees shall be collected by the clerks and paid into the school funds of the respective counties: Provided, that no such fees which are now required by law to be paid by the county shall be taxed in the bills of costs, nor shall any such fees be taxed in said bills of costs in cases where the defendants are assigned to work on the public roads of the state, or on any county properties.

The solicitors' fees are as follows:

(a) For every conviction under an indictment charging a capital crime, whether by plea or verdict, forty dollars.

(b) For perjury, forgery, passing or attempting to pass or sell any forged or counterfeited paper, or evidence of debt; maliciously injuring or attempting to injure any railroad or railroad car, or any person traveling on such railroad car; stealing or obliterating records; maliciously burning or attempting to burn houses or bridges; seduction; slander of an innocent woman, and embezzlement; breaking into houses otherwise than burglariously; assault with intent to commit rape; larcenies from the person; false pretense, and secret assault; in each of the above cases, twenty dollars.

(c) For larceny, receiving stolen goods, frauds, maims, deceits, escapes, and other felonies, fifteen dollars.

(d) For disturbing religious and other public meetings; for all violations of the prohibition law as to intoxicating liquors and narcotics; for fornication and adultery and resisting an officer, twelve dollars.

(e) For all other offenses, eight dollars.

No larger fee than ten dollars shall be taxed for the solicitor in an indictment against the justices of the peace of any county, as justices, when there are more than three justices who are found guilty.

The solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts respectively, and a sum to be fixed by the court, not to exceed ten per centum of the amount collected upon such penalty or forfeited recognizance, shall be taxed in such prosecutions.

For the performance of the solicitors' duties for the appointment of a receiver of an estate of a minor, there shall be taxed a sum to be fixed by the judge, not to exceed ten dollars; for passing on the returns of the receiver in such cases, where the estate of the infant does not exceed five hundred dollars, a sum not to exceed five dollars, and where the estate exceeds five hundred dollars, a sum to be fixed by the judge, not to exceed ten dollars; and in each case such sums taxed shall be paid out of the fund. (1873-4, c. 170; Code, s. 3737; 1885, c. 130;

1895, c. 14; 1901, c. 4, s. 5; Rev., s. 2768; 1915, c. 86; Ex. Sess. 1920, c. 97; Ex. Sess. 1921, c. 75; 1923, c. 157, s. 3; C. S., ss. 1235(a), 3891.)

Local Modification.—Columbus: 1951, c. 710.

Cross References.—As to salary of solicitors in lieu of fees, see §§ 7-44, 7-45.

As to solicitors' fees where the bill of indictment contains more than one count, see § 15-152.

ARTICLE 2.

When State Liable for Costs.

§ 6-13. Civil actions by the State; joinder of private party.—In all civil actions prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the State as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the State till after execution is issued therefor against such private party and returned unsatisfied. (Code, s. 536; Rev., s. 1259; C. S., s. 1236.)

Constitutionality.—In *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789 (1896), it was held that nothing in the Constitution deprives the legislature of power to enact this section.

Dependent upon Statute.—The general statutes giving costs do not include the sovereign, and the State is only liable for costs in the event of express statutory provisions. *Blount v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897).

Judgment against State.—Upon the failure of the litigation, the State is, under this section, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the solicitor, and judgment may be rendered in such action against the State for such costs. *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789 (1896).

Application to Legislature for Payment.—In an article entitled *Jurisdiction of The North Carolina Supreme Court*, 5 N. C. Law Rev. 1, 9, the following appears: "While the State may be sued only in the Supreme Court, it may sue in any court having jurisdiction over the cause of action, and the cost of such litigation may be taxed against the State as in case of private litigants. Such costs, however, do not constitute a claim against the State as contemplated in the jurisdiction of the Supreme Court, but are only incidental to the right to sue. The court in which the action is brought adjudicates the costs,

and the parties interested should apply to the legislature for payment." *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789 (1896); *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364 (1898); *Miller v. State*, 134 N. C. 270, 46 S. E. 514 (1904).

Actions to Vacate Oyster-Bed Entry.—Where, in an action by the solicitor in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action. *Blount v. Simmons*, 118 N. C. 9, 23 S. E. 923 (1896).

Under this section the State is liable for the costs of an action instituted by the State Solicitor to vacate an oyster-bed entry. In such case, it seems that the persons making the required affidavit, alleging that the entry is a fraud upon the State, might be held liable as relators if it should appear that the action was for their benefit and at their instance. *Blount v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897).

Where the proceedings for disbarment of an attorney have not been sustained the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. *Committee on Grievances of Bar Ass'n v. Strickland*, 201 N. C. 619, 161 S. E. 76 (1931).

§ 6-14. Civil action by and against State officers.—In all civil actions depending, or which may be instituted, by any of the officers of the State, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the Attorney General, and the

same is decided against such officers, the cost thereof shall be paid by the State Treasurer upon the warrant of the Auditor for the amount thereof as taxed. (1874-5, c. 154; Code, s. 3373; Rev., s. 1260; C. S., s. 1237.)

§ 6-15. **Actions by State for private persons, etc.**—In an action prosecuted in the name of the State for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the State. (Code, s. 537; Rev., s. 1261; C. S., s. 1238.)

§ 6-16. **Costs of county in certain bribery prosecutions to be a charge against State.**—The expenses incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any State officer or member of the General Assembly within said county, and of receiving bribes by any State officer or member of the General Assembly in said county, shall be a charge against the State, and the properly attested claim of the county commissioners shall be paid by the Treasurer of the State. (1868-9, c. 176, s. 6; 1874-5, c. 5; Code, s. 742; Rev., s. 1262; C. S., s. 1239.)

§ 6-17. **Costs of State on appeals to federal courts.**—In all cases, whether civil or criminal, to which the State of North Carolina is a party, and which are carried from the courts of this State, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the Supreme Court of the United States, and the State is adjudged to pay the costs, it is the duty of the Attorney General to certify the amount of such costs to the auditor, who shall thereupon issue a warrant for the same, directed to the Treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated. (1871-2, c. 26; Code, s. 538; Rev., s. 1263; C. S., s. 1240.)

ARTICLE 3.

Civil Actions and Proceedings.

§ 6-18. **When costs allowed as of course to plaintiff.**—Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In actions of which a court of a justice of the peace has no jurisdiction, unless otherwise provided by law.

4. In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages.

5. When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the State and not secreted at the commencement of the previous action or actions. (R. C., c. 31, s. 78; 1874-5, c. 119; Code, s. 525; Rev., s. 1264; C. S., s. 1241.)

- I. In General.
- II. Actions for Recovery of Real Property, etc.
- III. Recovery of Personality.
- IV. When Justice Has No Jurisdiction.
- V. No More Recovery of Costs than Damages.

I. IN GENERAL.

Meaning of Recovery.—The recovery referred to in this section is a final determination upon the merits, and success in the Supreme Court is by no means equivalent to a recovery in the court below. *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790 (1905).

And a recovery within the meaning of the section cannot be predicated upon anything coming to the plaintiff which was not in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title. *Patterson v. Ramsey*, 136 N. C. 561, 48 S. E. 811 (1904).

In order to determine who should pay the costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. *Patterson v. Ramsey*, 136 N. C. 561, 48 S. E. 811 (1904).

Partial Recovery.—There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In *Wall v. Covington*, 76 N. C. 150 (1877), it was held that no part of the costs in such actions can be taxed against the party recovering. And in *Horton v. Horne*, 99 N. C. 219, 5 S. E. 927 (1888), it was decided in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to costs. *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734 (1892); *Ferrabow v. Green*, 110 N. C. 414, 14 S. E. 973 (1892); *Kinston Cotton Mills v. Rocky Mount Hosiery Co.*, 154 N. C. 462, 70 S. E. 910 (1911).

Where the plaintiff is entitled to nominal damages, such damages will carry with it the cost under this section. *Wilson v. Forbes*, 13 N. C. 30 (1828); *Britton v. Ruffin*, 123 N. C. 67, 21 S. E. 271 (1898).

Section Qualified by § 28-115.—Where the action is not of such a nature that it falls within any of the subdivisions of this section or of the following section, it comes within the terms and is included

by § 6-20. *Parton v. Boyd*, 104 N. C. 422, 10 S. E. 490 (1889); *Yates v. Yates*, 170 N. C. 533, 87 S. E. 317 (1915). All these sections are, however, subject to the exception as to when costs are allowed against an administrator as stated in § 28-115. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630 (1905).

Action by Executor.—Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs under this section. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526 (1928).

II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Common-Law Rule.—Subdivision 1 of the section is in affirmance of the principle established before its enactment. *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699 (1892).

Construed with § 6-21.—This section, allowing plaintiffs' costs as of course, upon recovery, in an action involving title to real estate, and § 6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personality are related sections, pertain to the same subject matter, and must be construed in *pari materia*. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6 (1942).

Partial Recovery.—Applying the general rule as to partial recovery, which is set out under the preceding analysis line, it is held that where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff is exonerated as to costs and no part thereof should be found against him. *Ferrabow v. Green*, 110 N. C. 414, 14 S. E. 973 (1892); *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699 (1895); *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812 (1897); *Vanderbilt v. Johnson*, 141 N. C. 370, 54 S. E. 298 (1906). See also *Staley v. Staley*, 174 N. C. 640, 94 S. E. 407 (1917).

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. *Swain v. Clemmons*, 175 N. C. 240, 95 S. E. 489 (1918).

When There Is More than One Issue.—

In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of the defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. *Murray v. Spencer*, 92 N. C. 264 (1885).

Boundary Dispute.—Where, in an action in ejectment and for damages for cutting of timber, defendant files answer denying plaintiffs' title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants and the only controversy was as to the location of the boundary between their respective grants. *Cody v. England*, 221 N. C. 40, 19 S. E. (2d) 10 (1942).

Actions to Recover Both Realty and Personalty.—Under this section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he recovers the real property only. *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734 (1892).

Equitable Defense.—One who successfully maintains an equitable defense against the recovery of land on the bare legal title is entitled to judgment for his costs. *Vestal v. Sloan*, 83 N. C. 555 (1880).

Necessity for Disclaimer.—A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. *Swain v. Clemmons*, 175 N. C. 240, 95 S. E. 489 (1918).

This rule is forcibly illustrated by the case of *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699 (1895), where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed the plaintiff, and the plaintiff was nevertheless held entitled to costs.

But if the defendant disclaims title to all the land declared for, except that for which he proves his right, no issue as to the plaintiff's title will arise, and the findings that the defendant's title, disputed by the plaintiff, is good and that the de-

fendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699 (1895).

So in ejectment, where the defendant denies the right to possession and denies that the plaintiff holds the title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant. *Patterson v. Ramsey*, 136 N. C. 561, 48 S. E. 811 (1904).

It would seem that in order to escape potential liability for costs the defendant must enter his disclaimer of all the lands declared for, and that a disclaimer of half the locus in quo will not suffice to enable him to escape upon the unfavorable adjudication of the other half. See *In re Hurley*, 185 N. C. 422, 117 S. E. 345 (1923).

Liability of Intervener.—Where the defendant intervenes in an action to recover real property and files a joint answer with his co-defendant, and makes a joint defense, the plaintiff is entitled to the costs under this subdivision of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. *Spruill v. Arrington*, 109 N. C. 192, 13 S. E. 779 (1891). See also *Willis v. Coleburn*, 169 N. C. 670, 86 S. E. 596 (1915).

Bill of Interpleader.—The United States Supreme Court in *Spring v. South Carolina Ins. Co.*, 8 Wheat. (21 U. S.) 268, 5 L. Ed. 614 (1823), held that on a bill of interpleader, the plaintiffs are, in general, entitled to their costs out of the fund.

III. RECOVERY OF PERSONALTY.

Partial Recovery.—There is no exception to the partial recovery rule (see ante, this note, I. "In General") when the action is for the recovery of personalty, and when the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734 (1892); *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812 (1897). This is not the case where some of the defendants recover judgment, in which case, of course, they recover costs. *Phillips v. Little*, 147 N. C. 282, 61 S. E. 49 (1908).

As an example of the application of this rule to claims for personal property it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812 (1897).

Claim and Delivery.—Judgment in an action of claim and delivery carries all costs under this section. *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597 (1900).

Right to Possession Determines.—Where the controversy is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon an issue of fraud, the question of taxing the cost does not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, is entitled to recover the costs, under this section. *Maxton Auto Co. v. Rudd*, 176 N. C. 497, 97 S. E. 477 (1918).

IV. WHEN JUSTICE HAS NO JURISDICTION.

Construed with §§ 6-19 and 6-20.—The meaning of this subdivision of the section when considered in connection with § 6-20, is not clear, nor has it ever been fully and satisfactorily interpreted; but in many well considered decisions of the court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class of actions specified in §§ 6-18 and 6-19, in which the plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could be awarded in the discretion of the court under the provisions of § 6-20. *Yates v. Yates*, 170 N. C. 533, 87 S. E. 317 (1915).

Application.—A justice has no cogni-

§ 6-19. When costs allowed as of course to defendant.—Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. (C. C. P., s. 277; Code, ss. 526, 527; Rev., s. 1266; C. S., s. 1242.)

Cross Reference.—See § 6-18 and note.

Applications.—Where the plaintiff fails in an action upon a covenant, the defendant recovers costs under this section. *Britton v. Ruffin*, 123 N. C. 67, 31 S. E. 271 (1898).

§ 6-20. Costs allowed or not, in discretion of court.—In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law. (Code, s. 527; Rev., s. 1267; C. S., s. 1243.)

The purpose of this provision is to give justice of the case may require. *Gulley v. Macy*, 89 N. C. 343 (1883); *Parton v.*

zance of an action brought for the purpose of subjecting land to the payment of intestate's debts, *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790 (1905), consequently, such an action is controlled by this subdivision of the section; and a stakeholder who demurs to the complaint, has guardians ad litem appointed, etc., is liable for the costs. *Van Dyke v. Ins. Co.*, 174 N. C. 78, 93 S. E. 444 (1917).

V. NO MORE RECOVERY OF COSTS THAN DAMAGES.

In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than fifty dollars the plaintiff, under this section, recovers no more costs than damages. *Palmer v. Winston-Salem R., etc., Co.*, 131 N. C. 250, 42 S. E. 604 (1902). The subsection was applied where the recovery for slander was less than fifty dollars in *Smith v. Myers*, 188 N. C. 551, 125 S. E. 178 (1924). And again when one dollar damages were sustained by the erection of a mill. See *Bridgers v. Purcell*, 23 N. C. 232 (1840). The former rule as to slander is stated in *Coates v. Stephenson*, 52 N. C. 124 (1859), where it was held that the costs of the plaintiff, under R. C., c. 31, § 78, could not be taxed against the defendant.

For a case where an instructed verdict for one penny damages and one penny costs, under this section, was held erroneous because actual and not nominal damage was shown, see *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904).

Applied, as to action of slander, in *Wolfe v. Montgomery Ward & Co.*, 211 N. C. 295, 189 S. E. 772 (1937).

Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed. *Brisco & Co. v. Norris*, 112 N. C. 671, 16 S. E. 850 (1893).

Cited in *Gold v. Kiker*, 218 N. C. 204, 10 S. E. (2d) 650 (1940).

Boyd, 104 N. C. 422, 10 S. E. 490 (1889).

In actions of an equitable nature the costs are in the discretion of the court. *Yates v. Yates*, 170 N. C. 533, 87 S. E. 317 (1915).

Exercise of Discretion Presumed.—Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. *Gulley v. Macy*, 89 N. C. 343 (1883); *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734 (1892).

Discretion Not Reviewable.—By this section the taxing of the costs is placed in the discretion of the trial judge, which discretion is not reviewable. *Kluttz v. Allison*, 214 N. C. 379, 199 S. E. 395 (1938).

In equity there was a broad discretion on the subject of costs, *Little v. Lockman*, 50 N. C. 433 (1858), and the allowance rested with the court. *Worthy v. Brower*, 93 N. C. 492 (1885); *Hooper v. Davis*, 166 N. C. 236, 81 S. E. 1063 (1914). And even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. For example in *Hare v. Hare*, 183 N. C. 419, 111 S. E. 620 (1922), it was held where the jury found that each party was entitled to an undivided half in land, and the appeal was from taxing the defendant with costs, there being no element of an action in ejectment, neither party was permitted to recover costs from the other, especially as the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court.

But a consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. *Highland Cotton Mills v. Ragan Knitting Co.*, 194 N. C. 80, 138 S. E. 428 (1927).

New Trial.—See § 6-33 and notes thereto.

Qualified by § 28-115.—This provision is subject to the exception contained in § 28-115, relative to costs against a representative. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630 (1905).

Creditor's Bill.—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection; and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. *Bond v. Pickett Cotton Mills*, 166 N. C. 20, 81 S. E. 936 (1914).

Specific Performance.—Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract, it was clearly within this section. *Parton v. Boyd*, 104 N. C. 422, 10 S. E. 490 (1889).

Where one of defendants in injunction suit seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature. Consequently the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. *Chandler v. Cameron*, 229 N. C. 62, 47 S. E. (2d) 528, 3 A. L. R. (2d) 571 (1948).

Setting Aside Proceedings of Probate Court.—Where the action is to set aside certain proceedings in the probate court, the court is vested with discretion in the matter of allowing costs, under this section: each party is ordered to pay his own and each to pay one-half of the allowance to the referee. *Gulley v. Macy*, 89 N. C. 343 (1883).

§ 6-21. Costs allowed either party or apportioned in discretion of court.—Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

1. Application for year's support, for widow or children.
2. Caveats to wills.
3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.
4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just.

5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.

6. The compensation of referees and commissioners to take depositions.

7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.

8. In all proceedings under the chapter entitled Drainage, except as therein otherwise provided.

9. In proceedings for reallocation of homestead for increase in value, as provided in the chapter, Civil Procedure.

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow. (Code, ss. 533, 1294, 1323, 1422, 1660, 2039, 2056, 2134, 2161; 1889, c. 37; 1893, c. 149, s. 6; Rev., s. 1268; C. S., s. 1244; 1937, c. 143.)

Local Modification.—Nash: 1939, c. 46; 1941, c. 18.

Editor's Note.—The 1937 amendment added the paragraph at the end of this section.

For article discussing the effect of the amendment and the history of attorneys' fees as costs in this State, see 15 N. C. Law Rev. 333.

Caveats to Wills.—It is within the discretionary power of a court, under this section, before which an issue of *devisavit vel non* is tried, to direct the payment of the costs out of the estate. *Mayo v. Jones*, 78 N. C. 406 (1878). See *In re Hargrove*, 206 N. C. 307, 173 S. E. 577 (1934), for dicta on this point.

Where certain land contiguous to the lands of other devisees are devised, without direction in the will for the survey or partition or for perfecting the title, the cost of survey and registration of deeds should be borne by the devisees of the lands, and it is not a proper charge against the estate to be paid by the executor. *In re Winston*, 172 N. C. 270, 90 S. E. 201 (1916).

Under this section, even though judgment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveators, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. *In re Will of Slade*, 214 N. C. 361, 199 S. E. 290 (1938).

The allowance of attorney fees to counsel for the propounders is in the sound discretion of the trial court. *In re Coffield's Will*, 216 N. C. 285, 4 S. E. (2d) 870 (1939).

In actions for divorce the husband, whether successful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases

in the discretion of the court. *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673 (1902).

Allowance to Referee.—Originally, under the Code of 1883, § 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them in its discretion. *Cobb v. Rhea*, 137 N. C. 295, 49 S. E. 161 (1904).

Where, upon the trial in the superior court upon appeal from the referee, judgment is entered in the superior court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. *Cody v. England*, 221 N. C. 40, 19 S. E. (2d) 10 (1942).

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, and order of the court pro rating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Ordinarily, in litigation over a fund in the nature of an *in rem* proceeding, such items of costs, as referee's allowances and stenographic reporter's bills, are paid out of the fund, although taxable in the discretion of the court, but in *Lightner v. Boone*, 222 N. C. 421, 23 S. E. (2d) 313 (1942), it was held that, when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally.

Same—Analogy to Allowance to Receiver.—The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. Whether the receiver's fees should be di-

vided is a matter in the discretion of the presiding judge, as is now the case also with referees' fees. *Simmons v. Allison*, 119 N. C. 556, 26 S. E. 171 (1896).

Same—Not Precluded by Former Judgment.—A former judgment, *Horner v. Oxford Water, etc., Co.*, 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681 (1910), appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" under this section. *Horner v. Oxford Water & Electric Co.*, 156 N. C. 494, 72 S. E. 624 (1911).

Costs in Partition.—The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. *Fortune v. Hunt*, 152 N. C. 715, 68 S. E. 213 (1910).

Where, in a petition for partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case was pend-

ing on the civil issue docket. This does not include costs of reference which may be taxed in the discretion of the court. Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6 (1942).

In proceedings to partition lands held in common among the heirs at law of the deceased, including the question of dower and the claim of the widow to be allowed a certain fee-simple interest by contract, the court is without authority to allow attorneys' fees as a part of the costs, the same not being included in this section. Those cases wherein the employment of counsel was found necessary to protect the rights of infants represented by guardian in litigation, and other analogous cases, are not applicable to this case. *Regan v. Regan*, 186 N. C. 461, 119 S. E. 882 (1923).

The expense of employing attorneys in the successful defense of a suit for damages for tort is not allowable as part of the costs or recoverable in the absence of an express agreement therefor. *Queen City Coach Co. v. Lumberton Coach Co.*, 229 N. C. 534, 50 S. E. (2d) 288 (1948).

Applied in *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812 (1897).

Stated in *Perry v. Pulley*, 206 N. C. 701, 175 S. E. 89 (1934).

§ 6-22. Petitioner to pay costs in certain cases.—The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming lowlands where the petitioner alone is benefited.

2. In petitions for condemnation of water millsites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

3. In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

4. When the petition is refused. (Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562; Rev., s. 1269; C. S., s. 1245; 1945, c. 635.)

Editor's Note. — The 1945 amendment added at the end of subsection 1 the words "where the petitioner alone is benefited."

§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.—In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant.

If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Code, s. 216; Rev., s. 1270; C. S., s. 1246.)

Condemnation Proceedings.—In proceedings brought by a railroad where it was found by the jury on appeal that the defendant's benefit exceeded his damages and then found they were equal, it was held

that the plaintiff was taxable with costs up to the time of appeal. *Madison County R. Co. v. Gahagan*, 161 N. C. 190, 76 S. E. 696 (1912).

§ 6-24. **Suits in forma pauperis; no costs unless recovery.**—When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him. (1868-9, c. 96, s. 3; Code, s. 212; 1895, c. 149; Rev., s. 1265; C. S., s. 1247.)

Cross Reference.—As to when suits in forma pauperis may be permitted, see § 1-110.

Leave to Sue.—The leave to sue as a pauper does not extend in civil actions beyond the trial in the superior court. *Speller v. Speller*, 119 N. C. 356, 26 S. E. 160 (1896).

Costs of Witnesses.—One suing in forma pauperis is not entitled to recover costs of his witnesses. *Draper v. Buxton*, 90 N. C. 182 (1884). Nor does the section excuse the pauper from liability for his witnesses. *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890).

This provision, in terms, deprives all officers of costs, and the last clause of it is

very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. *Booshee v. Surles*, 85 N. C. 90 (1881); *Hall v. Younts*, 87 N. C. 285 (1882); *Draper v. Buxton*, 90 N. C. 182 (1884).

The Act of 1868-69, ch. 96, § 3, amending the section ameliorates the rigors of the pre-existing law in regard to witnesses, who are not compelled to attend for more than one day, if the party summoning shall, on presentation of the certificate of such attendance, fail to pay what may be then due them. *Booshee v. Surles*, 85 N. C. 90 (1881).

§ 6-25. **Party seeking recovery on usurious contracts; no costs.**—No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (1895, c. 69; Rev., s. 1271; C. S., s. 1248.)

Cross Reference.—As to usury generally, see §§ 24-1, 24-2.

§ 6-26. **Costs in special proceedings.**—The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Code, s. 541; Rev., s. 1272; C. S., s. 1249.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

§ 6-27. **Fees and disbursements in supplemental proceedings.**—The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements. (C. C. P., s. 273; Code, s. 499; Rev., s. 1273; C. S., s. 1250.)

Cross Reference.—As to examination of parties and witnesses in proceedings supplemental to execution, see § 1-356.

§ 6-28. **Costs of laying off homestead and exemption.**—The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the

latter costs shall be a lien on said homestead. (Code, s. 510; Rev., s. 1274; C. S., s. 1251.)

Cross References.—As to appraisal and laying off of homestead and personal property exemptions, see §§ 1-372, 1-378. As to costs in reallocation of homestead for increase in value, see § 6-21, subsec. 9.

Payment of Fees as Condition.—Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till

such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought in forma pauperis. *Whitmore-Ligon Co. v. Hyatt*, 175 N. C. 117, 95 S. E. 38 (1918).

Applied in *Beavans v. Goodrich*, 98 N. C. 217, 3 S. E. 516 (1887); *Long v. Walker*, 105 N. C. 90, 10 S. E. 658 (1890).

§ 6-29. Costs of reassessment of homestead.—If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Code, s. 521; Rev., s. 1275; C. S., s. 1252.)

Cross References. — As to reassessment of homestead, see § 1-381. As to costs in reallocation of homestead for increase in

value, see § 6-21, subsec. 9.

Applied in *Beavans v. Goodrich*, 98 N. C. 217, 3 S. E. 516 (1887).

§ 6-30. Costs against infant plaintiff; guardian responsible.—When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Code, s. 534; Rev., s. 1276; C. S., s. 1253.)

§ 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (Code, s. 535; Rev., s. 1277; C. S., s. 1254.)

Cross References. — As to liability of personal representative for denial of claim, see § 28-133. As to when costs against representative are allowed, see § 28-115. As to liability of guardian for costs for defaults, see § 33-30. As to reference of disputed claim generally, see §§ 28-111, 28-112.

When Fiduciary Personally Liable.—By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement, or bad faith, in such action or defense. *Smith v. King*, 107 N. C. 273, 12 S. E. 57 (1890); *Sugg v. Bernard*, 122 N. C. 155, 29 S. E. 221 (1898); *Lance v. Russell*, 165 N. C. 626, 81 S. E. 922 (1914).

The same rule is applied to actions

against administrators and executors, *State v. Roberts*, 106 N. C. 662, 19 S. E. 900 (1890); *Varner v. Johnston*, 112 N. C. 570, 17 S. E. 483 (1893), with the additional limitation prescribed by § 28-115. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630 (1905). See § 28-115 and note.

Includes Next Friends. — While "next friends" may not be embraced in the strict letter of this section, they come within its purview. *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113 (1891). And it is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. *Hockoday v. Lawrence*, 156 N. C. 319, 72 S. E. 387 (1911).

Allowance to Trustee. — A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and

expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the

property. *Chemical Company v. Johnson*, 101 N. C. 223, 7 S. E. 770 (1888).

Cited in *In re Hargrove*, 206 N. C. 307, 173 S. E. 577 (1934).

§ 6-32. Costs against assignee after action brought.—In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. (Code, s. 539; Rev., s. 1278; C. S., s. 1255.)

Absolute Assignments.—Cases have been decided in which it is held that the assignments contemplated by this section are only such as are absolute, and that such as are intended to be a collateral security only for a continuing obligation or claim

are not within the purview of the section. Nor does the section apply when the assignment is only of a part and not of the whole cause of action. *Davis v. Higgins*, 92 N. C. 203 (1885).

ARTICLE 4.

Costs on Appeal.

§ 6-33. Costs on appeal generally.—On an appeal from a justice of the peace to a superior court, or from a superior court or a judgment thereof to the Supreme Court, if the appellant recovers judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he has paid under the erroneous judgment of such court. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court. (Code, s. 540; Rev., s. 1279; C. S., s. 1256.)

In General.—The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. The trial court cannot ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. What is said by the court in *Dobson v. Southern R. Co.*, 133 N. C. 626, 45 S. E. 958 (1903), refers to the restitution of costs paid by the appellant in the court below. *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790 (1905).

New Trial.—Where a new trial is granted, the awarding of costs is discretionary. *Universal Metal Co. v. Durham R. Co.*, 145 N. C. 293, 59 S. E. 50 (1907).

When the new trial is on the ground of newly discovered evidence, the costs of the appellate court should always fall upon the party obtaining the new trial, unless in exceptional cases and for special reasons, since the other party is in no laches, as is shown by its having obtained the judgment below. This is also a wholesome rule of practice, as new trials on this ground are outside of the regular course and are only granted, in discretion, when justice requires a departure from the usual proce-

dure. By analogy, when a continuance is asked for on the ground of newly discovered evidence, the statute expressly forbids it to be granted except upon payment of the costs of the term. *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190 (1897); *Herndon v. North Carolina R. Co.*, 121 N. C. 498, 28 S. E. 144 (1897).

When both parties are entitled to a new trial, each will pay his own costs in the Supreme Court. *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190 (1897).

The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. *Satterthwaite v. Goodyear*, 137 N. C. 302, 49 S. E. 203 (1904).

Appeal from Justice's Court.—On an appeal from the court of a justice of the peace to the superior court, the trial in the superior court is de novo, and its costs in both courts are required, by this section and § 1-300, to be taxed against the unsuccessful party, or, as in this case, upon a judgment in the plaintiff's favor for the difference between the amount of her demand over that allowed upon the defendant's counterclaim set up by way of answer. *Richie v. Richie*, 192 N. C. 538, 135 S. E. 458 (1926).

Where the subject matter of the action is

destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. *Taylor v. Vann*, 127 N. C. 243, 37 S. E. 263 (1900).

Reversal Necessary to Tax Appellee. — Unless the court upon the merit reverses the judgment below, it cannot adjudge any part of the costs against the appellee. *Commissioners v. Gill*, 126 N. C. 86, 35 S. E. 228 (1900).

Partial Affirmance and Partial Reversal. — Where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the Supreme Court may be divided so that each party pays his own costs. *Smith v. Building and Loan Association*, 119 N. C. 249, 26 S. E. 41 (1896); *Hawkins v. Cedar Works*, 122 N. C. 87, 30 S. E. 13 (1898).

Under this section, where the appellant was awarded a partial new trial only, as to one issue only out of several, the costs of the appeal are in the discretion of the court. *Rayburn v. Casualty Co.*, 142 N. C. 376, 55 S. E. 296 (1906).

§ 6-34. Costs of transcript on appeal taxed in Supreme Court. — When an appeal is taken from the superior court to the Supreme Court, the clerk of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the costs thereof shall be taxed as a part of the costs of the Supreme Court. (1905, c. 456; Rev., s. 1280; C. S., s. 1257.)

Cross Reference. — As to duty of clerk to prepare transcript, see § 1-284.

Former Rule. — Prior to the enactment of this section, it was held that the successful party on appeal from the superior court was entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. *Dobson v. Southern R. Co.*, 133 N. C. 624, 45 S. E. 958 (1903).

Unnecessary Matter. — The Supreme Court has always held that the cost of

In *McLean v. Breece*, 113 N. C. 390, 18 S. E. 694 (1893), where the judgment was modified in the Supreme Court, the costs were taxed against the appellee. And where the plaintiffs recovered a part judgment on their demand, by establishing a mechanic's lien, they were entitled to costs of appeal. See *Hogsd v. Lumber Co.*, 170 N. C. 529, 87 S. E. 337 (1915).

Case Remanded. — Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. *Harrington v. Rawls*, 136 N. C. 65, 48 S. E. 571 (1904).

Modification by Superior Court. — The superior court is without power to modify former orders of the Supreme Court taxing costs on former appeals, as costs thus incurred are no part of superior court costs, but are taxed by, and executions issue out of, the Supreme Court. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6 (1942).

Applied in *Kincaid v. Graham*, 92 N. C. 154 (1885); *Ebert v. Dishar*, 216 N. C. 546, 5 S. E. (2d) 716 (1939).

printing unnecessary matter may be taxed against the party causing it to be sent up, regardless of the issue of the appeal. *Finch v. Strickland* 130 N. C. 44, 40 S. E. 841 (1902); *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (1904); *Wilson v. Atlantic Coast Line R. Co.*, 142 N. C. 333, 55 S. E. 257 (1906).

Especially is this so where the party has insisted on unnecessary matter being incorporated against the objection of the other party. See *Roanoke R., etc., Co. v. Privette*, 179 N. C. 1, 101 S. E. 489 (1919).

§ 6-35. Costs on appeal from justices of the peace.—1. After an appeal from the judgment of a justice of the peace is filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

2. If, on appeal from a justice of the peace, judgment is entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same. (1794, c. 414, s. 17, P. R.; R. C., c. 31, s. 106; Code, ss. 542, 566; Rev., ss. 1281, 1282; C. S., s. 1258.)

Cross References.—As to advance costs on appeal, see § 2-30. See also, § 1-299.

Applied in *Kincaid v. Graham*, 92 N. C. 154 (1885).

ARTICLE 5.

Liability of Counties in Criminal Actions.

§ 6-36. County to pay costs in certain cases; if approved, audited and adjudged.—In a criminal action, if there is no prosecutor designated by the court as liable for the costs under the provisions of General Statutes § 6-49, and the defendant is acquitted or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter. (R. S., c. 28, s. 12; R. C., c. 28, s. 8; 1874-5, c. 247; Code, ss. 733, 739; Rev., s. 1283; C. S., s. 1259; 1947, c. 781.)

Local Modification. — Hertford: 1933, c. 68; Johnston: 1939, c. 183; Swain: 1935, c. 210.

Editor's Note.—The 1947 amendment rewrote the first part of the first sentence.

In General.—This section and §§ 6-59, 6-60, and 6-63, collated and construed together, place it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of witnesses for the State or for an acquitted defendant, in whole or in part, to be paid by the county, and from his decision no appeal can be taken. *State v. Ray*, 122 N. C. 1095, 29 S. E. 948 (1898); *State v. Hicks*, 124 N. C. 829, 32 S. E. 957 (1899).

Construed with Local Law. — Where a public-local law permits the costs of a municipal court to be recovered from a county upon conviction of a criminal offense in certain instances, this provision will be construed in *pari materia* with this section, and the intent and meaning of the local law will be to permit a recovery of one-half the costs only. *City v. Guilford County*, 191 N. C. 584, 132 S. E. 558 (1926).

Nolle Prosequi Entered.—Where a nolle prosequi is entered on an indictment for homicide as to murder in the first degree, the witnesses for the State subsequently attending the trial are entitled to only half fees. *Coward v. Commissioners*, 137 N. C. 299, 49 S. E. 207 (1904).

The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. *State v. Johnson*, 101 N. C. 711, 8 S. E. 360 (1888).

Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. *State*

v. Shuffler, 119 N. C. 867, 26 S. E. 94 (1896).

Defendant Unable to Pay Costs. — To tax a county with the costs in a criminal action where the defendant is convicted, the trial judge must find that the defendant is unable to pay the costs. *Coward v. Commissioners*, 137 N. C. 299, 49 S. E. 207 (1904).

Subpoena of Witnesses.—For the attendance of a witness to be taxed as a part of the costs against the losing party to a civil action, or against the county in a criminal action, it is necessary that he should have been legally subpoenaed or lawfully recognized to attend. *State v. Means*, 175 N. C. 820, 95 S. E. 912 (1918).

Where Grand Jury Returns "Not a True Bill." — A county cannot be taxed, under this section, with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." *Guilford v. Board of Comm'rs*, 120 N. C. 23, 27 S. E. 94 (1897).

Appeal without Bond. — There being no statute authorizing it, the officers of the court are not entitled to collect from a county the costs accruing in the court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal in forma pauperis and is insolvent. *Clerk's Office v. Comm'rs*, 121 N. C. 29, 27 S. E. 1003 (1897).

Service on Public Roads. — Under this section the county is liable for the payment of full fees where the defendant is convicted and serves out a sentence on the public roads. *State v. Saunders*, 146 N. C. 597, 59 S. E. 695 (1907).

Applied in *State v. Horne*, 119 N. C. 853, 26 S. E. 36 (1896).

§ 6-37. Local modification as to counties paying costs.—In the following counties the county shall pay one-half the fees specified when "not a

true bill" is found: Alexander, Alleghany, Ashe, Avery, Bertie, Brunswick, Burke, Caldwell, Caswell, Catawba, Chatham, Clay, Craven, Davie, Duplin, Gaston, Granville, Greene, Guilford, Haywood, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Northampton, Onslow, Orange, Pamlico, Pender, Person, Pitt, Polk, Richmond, Robeson, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wilkes, Yadkin, Yancey. Provided, that Haywood County shall only be liable for one-half fee to clerks, constables and sheriffs serving process. (Code, ss. 733, 739; Rev., s. 1283; 1907, cc. 94, 162, 208, 606, 627, 695; 1909, cc. 50, 107; Pub. Loc. 1911, cc. 76, 167; Pub. Loc. 1915, c. 22; C. S., s. 1260; 1931, cc. 135, 187; 1933, c. 366.)

In Bladen County, where in a criminal proceeding before the grand jury a "true bill" is not found, the county shall pay one-half fees to clerks, sheriffs, officers, or constables who served any process in such proceeding. (1909, c. 183; C. S., s. 1260.)

In Brunswick and Catawba counties the county shall not be liable for any part of the costs of justices of the peace, when "not a true bill" is found. (1905, c. 598; Rev., s. 1283; 1909, c. 107; C. S., s. 1260.)

In Montgomery County, in criminal cases, where the defendant is convicted in superior court, justices of the peace are entitled to full fees, if any are legally taxed in the bill of costs. (1909, c. 223; C. S., s. 1260.)

In New Hanover County, in a criminal action, if the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half of the fees as provided in the first sentence of General Statutes § 6-36. (1905, c. 511; Rev., s. 1283; C. S., s. 1260; 1947, c. 781.)

In Northampton and Sampson counties where in criminal proceedings before the recorder's court, the grand jury, or superior court the defendant is found not guilty or a true bill is not found by the grand jury, or the defendant is found guilty and is sentenced by the court to serve on the roads or a term in jail, then the said county shall pay full fees to the sheriff, officer, or constable who served any process in such proceeding. (1937, c. 43; 1947, c. 427.)

Editor's Note.—The 1931 amendment added Avery and Guilford to the list of counties in the first paragraph, and the 1933 amendment added Haywood to the list.

The 1937 amendment added the last paragraph.

The 1947 amendments rewrote the next to last paragraph and made the last paragraph applicable to Sampson County.

§ 6-38. Liability of county when defendant acquitted in Supreme Court.—If, on appeal to the Supreme Court in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one-half the costs of the appeal and shall also pay all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court. Provided, where the cause has been removed, said costs shall be paid by the county in which the offense was committed instead of the county from which the appeal is taken. (Rev., s. 1284; C. S., s. 1261; 1947, c. 781.)

Editor's Note.—The 1947 amendment added the proviso.

§ 6-39. County where offense committed liable for costs.—In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. (1889, c. 354; Rev., s. 1285; C. S., s. 1262.)

§ 6-40. Liability of counties, where trial removed from one county to another.—The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire,

if one is ordered in the case, and the per diem and mileage of jurors who are impaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same is collected from him, on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justice of the peace of its own county, the amount due, with ten per cent additional, together with eight per cent interest on the sum due; and said courts of said county shall have full jurisdiction to hear, try and determine all actions and proceedings that may be brought for the purpose of enforcing the collection of the same. When the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof. (1889, c. 354; 1901, c. 718; Rev., s. 1285; C. S., s. 1263.)

Cross Reference. — As to requirement that prisoner pay charges and fees, see § 153-181.

§ 6-41. Statement of costs against county to be filed with commissioners.—In all criminal actions where the county is liable in whole or in part for costs, it is the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county. (1873-4, c. 116, s. 3; Code, s. 736; Rev., s. 1286; C. S., s. 1264.)

§ 6-42. Expenses in conveying prisoner to another county; provision for payment.—When a sheriff or other officer arrests a person under a *capias* or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer is obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried incurs any expense in going for and conveying said prisoner to his county, then in either case the sheriff or other officer shall file with the court or judge issuing the *capias* or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting, to be audited by them. Such sworn statement shall be received by the said board as *prima facie* correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county. (1885, c. 262; 1901, c. 64; Rev., s. 1287; C. S., s. 1265.)

§ 6-43. Cost of investigating lynchings.—In all cases of investigation

and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. (1893, c. 461, s. 6; Rev., s. 1288; C. S., s. 1266.)

Editor's Note.—This section was originally a part of ch. 461 of the Laws of 1893; other sections of this act pertaining to lynchings will be found as §§ 14-221, 14-222, 15-98, 15-99 and 15-128. It was held in *State v. Lewis*, 142 N. C. 626, 55

S. E. 600 (1906), that the Act of 1893 had lost none of its efficacy by splitting the same into sections and by placing these sections under the appropriate chapter headings of the Code.

§ 6-44. Costs due credited on taxes due by payee.—Whenever a bill of costs in a criminal action is presented to any board of county commissioners in any county of the State for payment, as provided in this chapter and article, and the said bill is ordered to be paid by the said county commissioners, it shall be the duty of the clerk of said board, before issuing any orders for payment of the sum set out in said bill, to ascertain whether any person to whom any amount is due on said bill of costs, is indebted to the county for taxes, and if said person to whom said order is payable is so indebted, the order shall state in its face, "Payable only on taxes due County," and upon presentation of such order to the sheriff or tax collector, said sheriff or tax collector shall give said taxpayer credit for the sum designated in said order, and the said sheriff or tax collector shall be entitled to receive credit for said sum so paid in his settlement for taxes.

It shall be unlawful for any board of county commissioners to pay to any person who is indebted to the county for taxes any money payable out of the revenues of the county on account of costs in a criminal case, which is payable by the county, except as provided in paragraph one above. (1933, c. 245.)

Local Modification.—Alamance: 1935, c. 319, ss. 1, 2; Craven: 1933, c. 426; Granville: 1933, c. 426; Wilson: 1933, c. 501.

ARTICLE 6.

Liability of Defendant in Criminal Actions.

§ 6-45. Costs against defendant convicted, confessing, or submitting.—Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution. (R. C., c. 35, s. 46; Code, s. 1211; Rev., s. 1291; C. S., s. 1267.)

In General.—The right of the officers to recover costs in the name of the State is a mere incidental one arising out of the conviction under the provisions of this section, and the judgment for them vests the claim in the officers to whom they are due. *State v. Crook*, 115 N. C. 760, 20 S. E. 513 (1894). The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to receive them. The judgment, though nominally in the name of the State, is, in effect, in favor of those performing services in the case for which the fees are given as a compensation. *State v. Mooney*, 74 N. C. 98 (1876).

The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include the costs incurred by the defendant in resisting the prosecution.

State v. Wallin, 89 N. C. 578 (1883).

Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defence, has no right to have his ticket for attendance allowed in the bill of costs. It is a personal debt of the defendant, the payment of which the witness may enforce by suing out execution in the cause. *State v. Wallin*, 89 N. C. 578 (1883).

No Part of Punishment.—The order for the payment of the costs of a criminal prosecution upon a suspension of judgment does not constitute any part of the punishment; the legal effect being only to vest the right to the costs in those entitled to them. *State v. Crook*, 115 N. C. 760, 20 S. E. 513 (1894).

Cited in 5 N. C. Law Rev. 359.

§ 6-46. Defendant imprisoned not discharged until costs paid.—If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law. (1868-9, c. 178; Code, s. 905; Rev., s. 1292; C. S., s. 1268.)

As to imprisonment for costs, see §§ 23-24, 153-191, 153-194 and *State v. Morgan*, 141 N. C. 726, 53 S. E. 142 (1906). As to when prosecutor may be imprisoned for failure to pay costs, see §§ 6-50 and 6-64.

Costs Not Part of Punishment. — The taxing the cost in a criminal action is not a part of the punishment for the offense committed. *State v. Smith*, 196 N. C. 438, 146 S. E. 73 (1929).

§ 6-47. Judgment confessed; bond given to secure fine and costs.—In cases where a court, mayor, or a justice of the peace permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (1879, c. 264; Code, s. 749; 1885, c. 364; Rev., s. 1293; C. S., s. 1269.)

Cross Reference. — As to bonds generally, see § 153-177.

In General. — The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was

made in the defendant's presence without his objection, and that its evident purpose was to save the defendant from a more grievous penalty permitted or required by law. *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011 (1909).

Cited in *State v. Smith*, 196 N. C. 438, 146 S. E. 73 (1929).

§ 6-48. Arrest for nonpayment of fine and costs.—In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the State, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law. (1879, c. 264; Code, s. 750; 1885, c. 364; Rev., s. 1294; C. S., s. 1270.)

Cited in *State v. Smith*, 196 N. C. 438, 146 S. E. 73 (1929).

ARTICLE 7.

Liability of Prosecutor for Costs.

§ 6-49. Prosecutor liable for costs in certain cases; court determines prosecutor.—In all criminal actions in any court, if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense and prosecution, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice is of the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. If a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, even though it is of the opinion that there was reasonable ground for the prosecution, order the prosecutor to pay the attendance fees of such witnesses, if it appear that they were summoned at the prosecutor's special request.

Every judge or justice is authorized to determine who the prosecutor is at

any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record. (1799, c. 4, s. 19, P. R.; 1800, c. 558, P. R.; R. C., c. 35, s. 37; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; Code, s. 737; 1889, c. 34; Rev., s. 1295; C. S., s. 1271; 1947, c. 781.)

Cross Reference.—See also, §§ 6-50, 6-52 and 6-64.

Editor's Note. — The 1947 amendment rewrote this section.

The word "of" in the words "court of justice" near the end of the first sentence was probably used inadvertently in place of "or" which would seem to better express the legislative intent.

General Consideration. — This section was intended to enlarge the power of the courts over the question of costs in criminal actions. *State v. Norwood*, 84 N. C. 794 (1881). Its enactment was within the power of the legislature. *State v. Cannady*, 78 N. C. 539 (1878).

Certifying Witnesses as Proper for Defense. — Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by this section, judgment will be allowed to stand if the court below will make and certify the requisite finding that the said witnesses were proper for the defense. *State v. Jones*, 117 N. C. 768, 23 S. E. 247 (1895).

In *State v. Owens*, 87 N. C. 565 (1882), it was stated that the section includes such witnesses for the defense as are certified by the counsel to have been proper for the defense, and the Supreme Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. See also *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889). In *State v. Roberts*, 106 N. C. 662, 10 S. E. 900 (1890), which was also a judgment taxing the prosecutor with the costs, the judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. The Supreme Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs upon the findings of these facts. *State v. Jones*, 117 N. C. 768, 23 S. E. 247 (1895).

See remarks of Mr. Justice Ashe upon the Act of 1875, ch. 247, and the substitution of the words "opinion" for "certify" and "or" for "and," by the Act of 1879, in *State v. Norwood*, 84 N. C. 794 (1881).

Where Magistrate Has Final Jurisdiction.—As to causes of which a magistrate

has final jurisdiction, when no appeal is taken from that court, it would seem, by virtue of § 6-52, that the prosecutor could only have been taxed with costs when the prosecution is adjudged frivolous or malicious, while this section extended to justices' as well as other courts, the power to tax the prosecutor with costs also in cases where there was no reasonable ground for the prosecution, or it was not required by public interest. Whatever difficulty there might have been in reconciling these apparently conflicting provisions of the Code is practically removed by ch. 34, Laws of 1889, which purports to amend this section, but which, also, being later in time, must modify § 6-52 where it conflicts with it. This statute of 1889 applies to justices', as well as other courts, and provides that the prosecutor shall be taxed with the costs if the defendant is discharged from arrest for want of probable cause. The opinion in *Merrimon v. Commissioners*, 106 N. C. 369, 11 S. E. 267 (1890), must be modified by adding to the instances in which the prosecutor in a case before a magistrate can be taxed with the costs, that of the defendant being discharged for want of probable cause, though it is still only when the prosecution is adjudged frivolous or malicious that any court is empowered to imprison the prosecutor for nonpayment of costs. *State v. Carlton*, 107 N. C. 956, 12 S. E. 44 (1890).

"Not Required for Public Interests."—A finding by the trial judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." *State v. Baker*, 114 N. C. 812, 19 S. E. 145 (1894).

Marking Prosecutor.—Under the Code of 1854 it was held that the person to be taxed must be marked on the bill as prosecutor (see *State v. Lupton*, 63 N. C. 483 (1869); *State v. Darr*, 63 N. C. 516 (1869)) and that the court had no right to order him to be marked as such without his consent. See *State v. Crosset*, 81 N. C. 579 (1879). But note the language of the section as it now reads, viz., "whether marked on the bill or warrant or not."

Notice. — It is necessary for the trial

court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915).

The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of the defendant's counsel or by the court of its own motion. *State v. Hughes*, 83 N. C. 665 (1880); *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854 (1890). The court should find the facts, and when this is done the findings are not reviewable in the Supreme Court. *State v. Owens*, 87 N. C. 565 (1882); *State v. Roberts*, 106 N. C. 662, 10 S. E. 900 (1890); *State v. Jones*, 117 N. C. 768, 23 S. E. 247 (1895).

A notice to mark one as prosecutor under this section need not be in writing. Where it was announced in open court, upon the calling and continuance of a State case, that a motion would be made at the next term to mark a witness as prosecutor (all the witnesses being present), and on the argument of the motion it was announced that all the parties were present, it was held to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor. *State v. Norwood*, 84 N. C. 794 (1881).

Insolvent Prosecutor—County Liable.—When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same. *Pegram v. Commissioners*, 75 N. C. 120 (1876).

Conclusiveness of Finding.—A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay the costs, is conclusive and not appealable. *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854 (1890).

§ 6-50. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous.—Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the nonpayment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (1800, c. 558; R. C., c. 35, s. 37; 1879, c. 49; 1881, c. 176; Code, s. 738; Rev., s. 1297; C. S., s. 1272.)

Constitutionality.—This section is constitutional. *State v. Cannady*, 78 N. C. 539 (1878); *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854 (1890).

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned. *State v. Lance*, 109 N. C. 789, 14 S. E. 110 (1891).

But where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of the due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915).

In this latter case it is said: "In the disposition made of this appeal we do not intend to impair or qualify our former decisions on the subject, notably *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854 (1890), and *State v. Roberts*, 106 N. C. 662, 10 S. E. 900 (1890), to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but, on the facts as they appear from his honor's findings, and we think it not improper to say that he has spread them on the record with commendable candor, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside."

Applied in *State v. Darr*, 63 N. C. 516 (1869); *State v. Baker*, 114 N. C. 812, 19 S. E. 145 (1894).

Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed,

does not constitute a debt within the meaning of Article one, section sixteen, of the Constitution, and hence the defendant may be imprisoned for nonpayment of the same. *State v. Wallin*, 89 N. C. 578 (1883). See note under § 6-45.

Where Bill Ignored. — No power is

conferred by this section to tax a prosecutor with costs when the bill is ignored. *State v. Cockerham*, 23 N. C. 381 (1841); *State v. Horton*, 89 N. C. 581 (1883); *State v. Gates*, 107 N. C. 832, 12 S. E. 319 (1890).

ARTICLE 8.

Fees of Witnesses.

§ 6-51. Not entitled to fees in advance.—Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the State or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance. (1868-9, c. 279, subch. 11, s. 3; Code, s. 1368; Rev., s. 1298; C. S., s. 1273.)

Cross Reference.—As to attendance of witnesses, see § 8-63.

§ 6-52. Fees and mileage of witnesses.—The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be such amount per day as the board of commissioners of the respective counties may fix, to be not less than one dollar per day and not more than three dollars per day, except in the counties of Alexander, Alleghany, Anson, Ashe, Brunswick, Burke, Clay, Cleveland, Dare, Franklin, Graham, Greene, Harnett, Haywood, Henderson, Johnston, Mitchell, Nash, Polk, Stanly, Swain, Transylvania and Union, in which counties the fees shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of the justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, but no prosecutor or complainant shall pay any costs except as provided by General Statutes, §§ 6-49 and 6-50: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the Utilities Commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route: Provided further, that any sheriff, deputy sheriff, chief of police, police, patrolman, State highway patrolman, and/or any other law enforcement officer who receives a salary or compensation for his services from any source or sources other than the collection of fees, shall prove no attendance, and shall receive no fee as a witness for attending at any superior or inferior criminal court sitting within the territorial boundaries in which such officer has authority to make an arrest: Provided, further, that in all criminal cases tried in the State where the crime charged is of the grade of a felony, all witnesses who have been held in jail incommunicado pending the trial of such case shall be paid witness fees for each such day which such witness is so held in jail, in addition to the witness fees pro-

vided by law in criminal actions. (Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; Rev., s. 2803; P. L. 1911, c. 402; C. S., s. 3893; Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40; 1941, c. 171; 1947, cc. 270, 781; 1949, c. 520.)

Local Modification.—Alamance: 1935, c. 264; Beaufort: 1931, c. 54; Cleveland, Henderson, McDowell, Polk, Rutherford: 1933, c. 495; Craven: 1935, c. 209; Duplin: 1935, c. 247; Forsyth: 1935, c. 333; Franklin: C. S. 3893; 1935, c. 93; Guilford: 1935, cc. 93, 185; Iredell: 1937 c. 240; Montgomery: 1951, c. 61; New Hanover: 1935, c. 237; Pitt, Richmond, Rowan, Wayne: 1935, c. 93.

Cross References. — As to liability of prosecutor for costs in certain cases, see § 6-49. As to appearance of witnesses before the Utilities Commission, see §§ 62-13, 62-16. As to attendance of witnesses in courts of justices of the peace, see §§ 7-144, 7-145.

Editor's Note. — The 1941 amendment added the last proviso to this section.

The first 1947 amendment struck out "Surry" from the list of counties in the first sentence, and the second 1947 amendment made changes in the first proviso.

The 1949 amendment struck out "Randolph" from the list of counties.

In General.—The manner of summoning witnesses, and their compensation is entirely regulated by statute. *Stern & Co. v. Herren*, 101 N. C. 516, 8 S. E. 221 (1888).

Proof of Attendance.—Witnesses should swear to their attendance at each term, and the ticket should state the number of days' attendance at each term. *Thompson v. Hodges*, 10 N. C. 318 (1824).

Same—State's Witnesses upon Acquittal. — Costs and charges of State's witnesses upon acquittal of a defendant were ordered to be paid by the county; and in an action against the commissioners to recover the amount of tickets issued to such witnesses: It was held, (1) that ch. 105, § 33, Bat. Rev. makes the tickets presumptive evidence of the facts set forth therein—attendance, miles traveled, etc.; (2) this evidence, together with the order of the court, imposes a duty upon defendants to provide for their payment. *Deaver v. Commissioners*, 80 N. C. 116 (1879). Section 6-53 now provides that "the certificate of the clerk shall be sufficient evidence of the debt."—Editor's Note.

A witness in a criminal action has no claim upon the county until the liability of the county for the costs is passed upon by the court. *Young v. Commissioners*, 76 N. C. 316 (1877).

Liability of County for Defendant's

Witnesses.—The liability of the county for defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. *State v. Horne*, 119 N. C. 853, 26 S. E. 36 (1896); *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94 (1897). See § 6-59 and notes thereto.

Witnesses for the losing party receive no pay unless said party be solvent. *State v. Wheeler*, 141 N. C. 773, 53 S. E. 358 (1906).

But this does not abridge the right of all the witnesses to recover compensation against the party summoning them. *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889).

A witness can always prove his attendance against the party who subpoenas him. *Sitton v. Lumber Co.*, 135 N. C. 540, 47 S. E. 609 (1904).

When Grand Jury Witnesses Entitled to Compensation.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned indorsed thereon as sworn and sent. *Lewis v. Commissioners*, 74 N. C. 194 (1876).

Witnesses to Testify Generally before Grand Jury.—There is no provision of law for the payment of witnesses summoned to appear and testify generally before the grand jury "in certain matters then and there to be inquired of." *Lewis v. Commissioners*, 74 N. C. 194 (1876).

When Court Rules Witness Incompetent.—Where a witness was ruled by the court to be incompetent, and such ruling was not appealed from, or reversed, it was held that his fees could not be taxed against the adverse party, whether the ruling out of the witness was erroneous or not. *Keith v. Goodwin*, 51 N. C. 398 (1859).

May Not Withdraw Witness Ticket and Sue Thereon.—A witness is not at liberty after final judgment to withdraw his "witness ticket" and sue upon it. His fees for attendance should be taxed and collected with the other costs against the party adjudged to pay the same, if he be solvent; and if not, then the prevailing party who summoned and required his testimony is

responsible therefor. *Belden v. Snead*, 84 N. C. 243 (1881).

Court's Power to Fix Fees for Expert Witnesses.—The court has now the statutory authority to fix the fees of expert witnesses, and its action is *res judicata* as to the amount, leaving open the question of the legality of the taxing of the fee on a motion to retax. *Chadwick v. Life Ins. Co.*, 158 N. C. 380, 74 S. E. 115 (1912).

The amount to be paid an expert witness testifying at a hearing before a commissioner of the industrial commission in proceedings before him under the Work-

men's Compensation Act is a question to be determined in the discretion of the court and the witness may not require that it be fixed in advance before testifying as to a material matter involved in the inquiry. *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931).

The court has discretionary authority under this section, to allow expert witnesses compensation and mileage, and plaintiff's remedy upon being so taxed is to move to retax the costs rather than to except under § 6-54. *Connor v. Hayworth*, 206 N. C. 721, 175 S. E. 140 (1934).

§ 6-53. Witness to prove attendance; action for fees.—Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the State and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered. (1777, c. 115, s. 46, P. R.; 1796, c. 458, P. R.; R. C., c. 31, s. 73; 1868-9, c. 279, subch. 11, ss. 2, 4; Code, s. 1369; Rev., s. 1299; C. S., s. 1274.)

Cross Reference.—As to attendance of witnesses generally, see §§ 8-59, 8-60.

In General.—Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court in the cases, and only within the limits authorized by statute. *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889). See *State v. Wheeler*, 141 N. C. 773, 53 S. E. 358 (1906).

Need Not Show Assignment of Witness Tickets.—The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the superior court that these fees have been taxed against the party recovering the judgment, and paid by him, he is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. *McClure v. Fulbright*, 196 N. C. 450, 146 S. E. 74 (1929).

Witnesses Not Sworn or Tendered.—Where a trial is had and the witnesses are not sworn or tendered, their costs cannot be taxed against the party cost. *Loftis v. Raxter*, 66 N. C. 340 (1872). But where the defendant's witnesses are present and are not sworn or tendered because the

plaintiff takes a nonsuit, the costs of such witnesses are properly taxable against the plaintiff. *Henderson v. Williams*, 120 N. C. 339, 27 S. E. 30 (1897).

There is no provision in our law authorizing the taxation as costs, of the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been summoned but who are nonresidents of the State. *Stern v. Herren*, 101 N. C. 516, 8 S. E. 221 (1888).

Witnesses Subpoenaed but Not Examined.—When a cause has been tried, only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the other. *Hobbs v. Atlantic, etc., R. Co.*, 151 N. C. 134, 65 S. E. 755 (1909); *Chadwick v. Life Ins. Co.*, 158 N. C. 380, 74 S. E. 115 (1912).

It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses and prevent being taxed with an excessive number upon any single point by such wit-

nesses being sworn and tendered to the opposite party for examination. *Porter v. Durham*, 79 N. C. 596 (1878). It is true that in *Loftis v. Raxter*, 66 N. C. 340 (1872), it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for "sworn and examined or tendered" i. e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined, that their materiality may be shown. Otherwise, a successful party may oppress the losing party by subpoenaing and swearing any number of witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of this materiality. They must be examined or tendered to the opposite party to be examined, should he so choose, and if examined by the opposite party they are

to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses. *Sitton v. Lumber Company*, 135 N. C. 540, 47 S. E. 609 (1904).

Effect of Nonsuit.—The costs of the defendant's witnesses who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. *Henderson v. Williams*, 120 N. C. 339, 27 S. E. 30 (1897), citing *Loftis v. Raxter*, 66 N. C. 340 (1872), cited in *Sitton v. Lumber Company*, 135 N. C. 540, 47 S. E. 609 (1904).

A pauper is not excused from liability for his witnesses. *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890).

Witnesses Summoned by Both Parties.—A witness summoned by each party to a suit is entitled to compensation from each. *Peace v. Person*, 5 N. C. 188 (1808).

§ 6-54. Witness tickets to be filed; only two witnesses for single fact.—At the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact. (1783, c. 189, s. 3, P. R.; 1796, c. 458, s. 2, P. R.; R. C., c. 31, s. 74; Code, s. 1370; Rev., s. 1300; C. S., s. 1275.)

Local Modification.—Anson, Buncombe, Columbus, Forsyth, Gaston, Richmond, Robeson, Rutherford, Surry: C. S. 1276.

Editor's Note.—Service as a witness, as stated in *State v. Wheeler*, 141 N. C. 773, 53 S. E. 358 (1906), is the exaction of a public duty, which men are required to render either wholly without compensation or usually with inadequate pay, as the sovereign may require. Originally none received any pay, and to this day witnesses, above two to each material fact, receive no pay.

Where the issue submitted is a complex one, involving the investigation of a multiplicity of single facts material to be ascertained, to establish each such fact two witnesses are allowable under this section. *Ex parte Beckwith*, 124 N. C. 111, 32 S. E. 393 (1899).

Four Witnesses Summoned—Two Called by Each Party.—Where there was only one issue in the case, and plaintiff summoned four witnesses, but called only two of them, and the defendant sum-

moned the witness who did not attend, the defendant was nevertheless liable for the costs of the two witnesses not sworn, as the court could not say that they had not been summoned to contradict testimony expected from the defendant's witness. *Hayle v. Cowan*, 2 N. C. 21 (1793).

Against Parties Summoning Witnesses.—While not more than two witnesses, summoned by the successful party to prove a single fact, can be taxed against the losing party under this section, this does not abridge the right of all the witnesses to recover compensation against the party summoning them. *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889).

This section does not apply to expert witnesses, the court being allowed under § 6-52 to exercise its discretion with reference to compensation for same. *Connor v. Hayworth*, 206 N. C. 721, 175 S. E. 140 (1934).

Applied in *Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338 (1892).

§ 6-55. Fees of witnesses before jury of view, commissioner, etc.—Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attend-

ance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the State, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this State, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning. (1805, c. 685, P. R.; 1848, c. 66; 1850, c. 188, s. 3; R. C., c. 31, s. 67; Code, s. 1365; Rev., s. 1301; C. S., s. 1277.)

§ 6-56. Fees of witnesses before grand jury.—No witness shall receive pay for attendance in a criminal case before a grand jury, unless such witness has been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or unless he has been bound or recognized by some justice of the peace to appear before the grand jury. (1879, c. 264; Code, s. 743; Rev., s. 1302; C. S., s. 1278.)

Local Modification.—Martin, Moore, Wayne: C. S. 1279.

Cross Reference.—As to witnesses before grand jury, see §§ 15-138, 15-139.

Permission to Summon.—Grand jurors have no right to summon witnesses to appear before them except by the permission of their foreman or of the solicitor as pre-

scribed by this section. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453 (1889).

Endorsement of Names.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned endorsed thereon as sworn and sent. *Lewis v. Board of Comm'rs*, 74 N. C. 194 (1876).

§ 6-57. Repealed by Session Laws 1947, c. 781.

§ 6-58. County to pay State's witnesses in certain cases.—Witnesses summoned or recognized on behalf of the State to attend on any criminal prosecution in the superior or criminal courts, except in actions or proceedings in which a justice of the peace has final jurisdiction, which are commenced or tried in a court of a justice of the peace, mayor, or in a county or recorder's court, where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the State, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid. (1804, c. 665, P. R.; 1819, c. 1008, P. R.; 1824, c. 1253, P. R.; R. C., c. 28, s. 9; Code, s. 740; Rev., s. 1289; C. S., s. 1281; 1947, c. 781.)

Local Modification.—Durham, Wilkes: C. S. 1282; Wake: C. S. 1282; 1929, c. 102; 1931, c. 201.

Cross Reference.—See note under § 6-36.

Editor's Note.—The 1947 amendment inserted the exception clause beginning in line three.

For history of pay of State's witnesses, see *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889).

Service out of State.—The service of a

subpoena on a witness beyond the borders of the State in a criminal action is not valid; and where the trial judge has allowed a necessary nonresident witness to prove his ticket against the county with mileage to the State line, there is no authority for him to allow the witness to prove for services rendered by him outside of the State when service has been attempted there. *State v. Means*, 175 N. C. 820, 95 S. E. 912 (1918).

§ 6-59. County to pay defendant's witnesses in certain cases.—When the defendant is acquitted, a nolle prosequi entered, or judgment against him arrested, and it is made to appear to the court, by certificate of counsel or

otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attendance, and that they were necessary for his defense, it is the duty of the court, unless the prosecutor is adjudged to pay the costs, to make and file an order in the cause directing that said witnesses be paid by the county in such manner and to such extent as is authorized by law for the payment of State's witnesses in like cases. (1879, c. 264; 1881, c. 312; Code, s. 747; Rev., s. 1290; C. S., s. 1283.)

Cross Reference.—See §§ 6-36 and 6-64.

In General.—This section shows the legislative intent to restrict payment by the county of the defendant's witnesses to the cases specified, and their number and amount of compensation. *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889), discussing authority to tax defendant's witnesses against the county when the "bill is quashed."

The liability of the county for the de-

fendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to the defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. *State v. Horne*, 119 N. C. 853, 26 S. E. 36 (1896); *Guilford v. Comm'rs*, 120 N. C. 23, 27 S. E. 94 (1897).

§ 6-60. Fees of State witnesses; two only in misdemeanors; one fee for day's attendance.—No person shall receive pay as a witness for the State on the trial of any criminal action unless such person was summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the State in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day. (1871-2, c. 186; 1879, c. 264; Code, s. 744; Rev., s. 1303; C. S., s. 1284.)

§ 6-61. On appeal from justice only two witnesses bound over.—When the defendant appeals from the judgment of the justice of the peace, in any criminal action, it is the duty of such justice of the peace to select and bind over on behalf of the State not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses are summoned by order of the appellate court as provided in the preceding section. (1879, c. 264; Code, s. 745; Rev., s. 1304; C. S., s. 1285.)

When Nol. Pros. Entered.—Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol.

pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. *State v. Shuffler*, 119 N. C. 867, 26 S. E. 94 (1896).

§ 6-62. Solicitor to announce discharge of State's witnesses.—It is the duty of all solicitors prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call, in open court, and announce the discharge of witnesses for the State, either finally or otherwise as the disposition of the case may require, and thereupon the clerk of the superior court shall enter such announcement of discharge, with the names of the witnesses discharged, in his minutes. (1879, c. 264; 1881, c. 312; Code, s. 746; Rev., s. 1305; C. S., s. 1286; 1935, c. 26.)

Cross Reference.—As to discharge of witnesses generally, see § 8-63.

Editor's Note.—The 1935 amendment omitted the former provisions as to the

certificate of attendance. It added the requirement that the discharge be in open court. The requirement for entry on the minutes is also new.

§ 6-63. Witnesses not paid without certificate; court's discretion.—No county, prosecutor or defendant shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name is certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law. The court, at any time within one year after judgment, may order that any witness may be paid who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs. (1879, c. 264; 1881, c. 312; Code, ss. 733, 748; Rev., s. 1306; C. S., s. 1287.)

The discretion conferred upon the court, in this section, in respect to regulating, or refusing to allow any compensation to the witnesses therein named, is not reviewable. *State v. Massey*, 104 N. C. 877, 10 S. E. 608 (1889).

It is within the discretion of the trial court (under § 733 of the Code of 1883) to refuse to make an order for the payment by the county of the fees of witnesses for a defendant acquitted of a criminal charge,

where no prosecutor is marked, and the exercise of such discretion is not reviewable. *State v. Ray*, 122 N. C. 1095, 29 S. E. 948 (1898).

Appeal.—In an appeal from defendant's motion to retax the costs in a criminal action it should appear on the record that the provisions of this and § 6-60 were complied with and when it does not so appear the case will be remanded. *State v. Kirby*, 201 N. C. 789, 161 S. E. 483 (1931).

ARTICLE 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ 6-64. Liability for criminal costs before justice, mayor, county or recorder's court.—In no action or proceeding in which a justice of the peace has final jurisdiction, commenced or tried in a court of a justice of the peace, mayor or in a county or recorder's court, shall the county be liable to pay any costs. Any defendant or prosecuting witness shall have the right of appeal to the superior court. (1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; Code, s. 895; Rev., s. 1307; C. S., s. 1288; 1931, c. 252; 1947, c. 781.)

Local Modification.—*Jackson*: 1933, c. 225; *Martin*: 1935, c. 20; *Swain*: 1935, c. 84.

Cross References.—As to liability of prosecutor for costs, see § 6-49. As to liability of county for costs, see § 6-36. As to appeals, see §§ 15-177, 15-180.

Editor's Note.—The 1931 amendment rewrote this section, which formerly applied only to proceedings before a justice. The 1947 amendment also rewrote this section.

For general discussion of costs in criminal actions before a justice of the peace, see *Merrimon v. Henderson County Com'rs*, 106 N. C. 369, 11 S. E. 267 (1890); *State v. Carlton*, 107 N. C. 956, 12 S. E.

44 (1890).

Where the justice of the peace has testified on the trial to recover damages for a false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed him. *Harris v. Singletary*, 193 N. C. 583, 137 S. E. 724 (1927).

Taxation of Prosecutor in Justices Court.—See annotations under § 6-49.

Cited in 5 N. C. Law Rev. 359, in a note on "Interest in Costs."

§ 6-65. Imprisonment of defendant for nonpayment of fine and costs.—If a justice of the peace, mayor or judge of a county or recorder's court sentences a party found by him to be guilty to pay a fine and costs in a criminal action or proceeding within the jurisdiction of a justice of the peace, and the same are not immediately paid, the justice of the peace, mayor or judge of a county or recorder's court shall commit the guilty person to the county jail until the same are paid, or he is otherwise discharged according to law. (1868-9, c. 178, subchap. 4, s. 15; Code, s. 904; Rev., s. 1308; C. S., s. 1289; 1947, c. 781.)

Cross Reference.—See also § 6-64 and note.

Editor's Note.—The 1947 amendment rewrote this section.

Chapter 7.

Courts.

SUBCHAPTER I. SUPREME COURT.

Article 1.

Organization and Terms.

Sec.

- 7-1. Number of justices.
- 7-2. Election and term of office.
- 7-3. Salaries of Supreme Court justices.
- 7-4. Oath of office.
- 7-5. Name of court; where records to be kept.
- 7-6. Quorum.
- 7-7. Terms of court.

Article 2.

Jurisdiction.

- 7-8. Original jurisdiction.
- 7-9. Procedure to enforce claims against the State.
- 7-10. Appellate jurisdiction.
- 7-11. Power to render judgment and issue execution.
- 7-12. No judgment on interlocutory order; opinion certified.
- 7-13. Power of amendment and to require further testimony.
- 7-14. Proof of exhibits.
- 7-15. Opinions and judgments to be in writing.
- 7-16. Certificates to superior courts; execution for costs; penalty.
- 7-17. Appeals dismissed.
- 7-18. Petition to rehear; execution restrained.
- 7-19. Records to be made.
- 7-20. Power to make rules of court.
- 7-21. Supreme Court to prescribe rules; rules to conform to law.

Article 3.

Officers of Court.

- 7-22. The court may appoint acting Attorney General.
- 7-23. Reporter.
- 7-24. Supreme Court reporter; salary; offices.
- 7-25. Clerk.
- 7-26. Clerk of Supreme Court; salary; fees.
- 7-27. Clerk's bond and oath of office.
- 7-28. Clerk to report money on hand.
- 7-29. Marshal; librarian.
- 7-29-1. Administrative assistant to Chief Justice.

Article 4.

Supreme Court Library.

Sec.

- 7-30. Location.
- 7-31. Trustees; powers; duties.
- 7-32. Library hours; night use.
- 7-33. Appropriation.

Article 5.

Supreme Court Reports.

- 7-34. Supreme Court reports; contract for printing.
- 7-35. Supreme Court reports; number printed.

Article 6.

Salaries of Supreme Court Employees.

- 7-36. Governor and council to fix certain salaries.
- 7-37. Limit of salary; certificate and payment.
- 7-38. Proceedings and reports.
- 7-39. Employment of additional assistants; compensation.

SUBCHAPTER II. SUPERIOR COURTS.

Article 7.

Organization.

- 7-40. Number of judges and solicitors.
- 7-41. Election and term of office of judges.
- 7-42. Salaries of superior court judges.
- 7-43. Election and term of office of solicitors.
 - 7-43.1. Assistant solicitor appointed by county board of commissioners.
 - 7-43.2. Designating prosecuting attorney of inferior court to assist solicitor.
 - 7-43.3. Assistant solicitor to represent State during absence or disability of regular solicitor.
- 7-44. Solicitors; general compensation.
- 7-45. Appropriation for expenses of solicitor.
- 7-46. Judicial districts; resident judge; rotation; special superior court judges; assignment of superior court judges by Chief Justice.
- 7-47. Oath of office.
- 7-48. Vacancies filled.
- 7-49. When judge may discharge solicitor.
- 7-50. Emergency judges; duties; compensation.

CHAPTER 7. COURTS

Sec.

7-51. Salaries of resigned or retired justices of Supreme Court and judges of superior courts.

7-51.1. Salaries of justices or judges retired because of accident or disease.

7-51.2. Retired justices and judges subject to assignment as emergency judges.

7-52. Jurisdiction of emergency judges.

7-53. Orders returnable to another judge; notice.

7-54. Governor to make appointment of four special judges.

7-55. Removal of special judges; filling vacancies.

7-56. Further appointments.

7-57. Extent of authority.

7-58. Same powers and authority as regular judges.

7-59. Salary and expenses; terms; practice of law.

7-60. Powers after commission expires.

7-61. Effect on sections 7-50 and 7-51.

7-61.1. Powers of elected judges holding courts by assignment, exchange or otherwise.

7-62. Disposition of motions where judge disqualified.

Article 8.

Jurisdiction.

7-63. Original jurisdiction.

7-64. Concurrent jurisdiction.

7-65. Jurisdiction in vacation or at term.

7-66. Appellate jurisdiction.

7-67. Transfer of cases pending in abolished inferior court.

Article 9.

Judicial and Solicitorial Districts and Terms of Court.

7-68. Number of districts.

7-69. Eastern and western judicial divisions.

7-70. Terms of court.

7-70.1. Assignment of judges to hear non-jury matters.

7-71. Chief Justice of the Supreme Court to assign judges to hold terms of court when regular judges are not available.

7-71.1. Chief Justice of the Supreme Court authorized to cancel terms of court; judges available for assignment elsewhere.

7-71.2. Cancellation not to affect subsequent terms.

7-72. Civil cases at criminal terms.

7-73. No criminal business at civil terms.

7-73.1. Calendar for all terms for trial of criminal cases.

Sec.

7-74. Rotation of judges.

7-75. Exchange of courts.

7-76. Court adjourned by sheriff when judge not present.

Article 10.

Special Terms of Court.

7-77. Chief Justice of the Supreme Court may designate judge.

7-78. Chief Justice of the Supreme Court may order special terms.

7-79. Compensation of judge.

7-80. Notice of special terms.

7-81. Certificate of attendance.

7-82. Grand juries at special terms.

7-83. Jurisdiction.

7-84. Attendance and process at special terms.

7-85. Subpoenas returnable.

Article 11.

Special Regulations.

7-86. Reading the minutes.

7-87. Officer attending juries sworn.

7-88. Quakers may wear hats in court.

7-89. Court reporters.

7-90. Official court reporter for second judicial district.

7-91. Official court reporter for fifth judicial district.

7-92. Official court reporter for sixth judicial district.

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

Article 12.

Commission for Improvement of Laws.

7-93 to 7-100. [Repealed.]

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Article 13.

Domestic Relations Courts.

7-101. Establishment by county or city or both.

7-102. Vote on establishment of court; any other city in county with required population may have such court.

7-103. Jurisdiction.

7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile court officers may be declared officers of new court.

7-105. Co-operation of all peace officers.

7-106. Procedure, practice and punishments.

CHAPTER 7. COURTS

Sec.

- 7-107. Right of appeal to superior court; trial de novo.
- 7-108. Offenses before court to be petty misdemeanors; demand for jury trial; appearance bonds.
- 7-109. Pending cases in juvenile court transferred to new court.
- 7-110. Cases transferred from superior court.
- 7-111. Discontinuance of court.

SUBCHAPTER V. JUSTICES OF THE PEACE.

Article 14.

Election and Qualification.

- 7-112. Constitution, article seven, abrogated; exceptions.
- 7-113. Election and number of justices.
- 7-114. Oath of office; vacancies filled.
- 7-115. Governor may appoint justices.
- 7-116. Forfeiture of office.
- 7-117. Resignation.
- 7-118. Removal and disqualification for crime.
- 7-119. Justice may hold other office.
- 7-120. Validation of official acts of certain justices of the peace.

Article 14A.

Appointment by Judge and Abolition of Fee System.

- 7-120.1. Determination by county commissioners of number of justices to be appointed.
- 7-120.2. Appointment and removal by the resident judge.
- 7-120.3. Term of office.
- 7-120.4. Salaries and fees.
- 7-120.5. Deposits and reports.
- 7-120.6. Jurisdiction and places for holding court.
- 7-120.7. Vacancies.
- 7-120.8. Expiration of terms of present justices; transfer of pending cases.
- 7-120.9. Bond.
- 7-120.10. Counties exempt from article.
- 7-120.11. Conflicting laws repealed.

Article 15.

Jurisdiction.

- 7-121. Jurisdiction in actions on contract.
- 7-122. Jurisdiction in actions not on contract.
- 7-123. Action dismissed for want of jurisdiction; remitter.
- 7-124. Title to real estate in controversy as a defense.
- 7-125. Title to real estate in controversy, action dismissed.

Sec.

- 7-126. Another action in superior court.
- 7-127. Justice may act anywhere in county.
- 7-128. Punishment for contempt in certain cases.
- 7-129. Jurisdiction in criminal actions.

Article 16.

Dockets.

- 7-130. Justice shall keep docket.
- 7-131. Entries to be made.
- 7-132. Dockets filed with clerk.
- 7-133. Dockets, papers, and books delivered to successor.

Article 17.

Fees.

- 7-134. Fees of justices of the peace.

Article 18.

Process.

- 7-135. Action begun by summons.
- 7-136. Issuance and contents of summons.
- 7-137. Service and return of summons.
- 7-138. Process issued to another county.
- 7-139. Civil process in inferior courts.
- 7-140. Endorsement of process to another county.
- 7-141. Certificate of clerk on process for another county.
- 7-142. Judgment against defendant in another county.
- 7-143. Service on foreign corporation.
- 7-144. Attendance of witnesses.
- 7-145. Subpoena issued to another county.
- 7-146. Subpoena duces tecum in case against railroad.

Article 19.

Pleading and Practice.

- 7-147. Removal of case.
- 7-148. Removal in case of death or incapacity.
- 7-149. Rules of practice.

Article 20.

Jury Trial.

- 7-150. Parties entitled to a jury trial.
- 7-151. Jury trial waived.
- 7-152. Number constituting the jury.
- 7-153. Jury list furnished.
- 7-154. Names kept in jury box.
- 7-155. Fees deposited for jury trial.
- 7-156. Jury drawn and trial postponed.
- 7-157. Summoning the jury.
- 7-158. Selection of jury.
- 7-159. Challenges.
- 7-160. Names returned to the jury box.
- 7-161. Names of jurors serving.
- 7-162. Tales jurors summoned.

CHAPTER 7. COURTS

Sec.

- 7-163. No juror to serve out of township.
- 7-164. Additional deposit for jury fees on adjournment.
- 7-165. Jury sworn and impaneled; verdict; judgment.

Article 21.

Judgment and Execution.

- 7-166. Justice's judgment docketed; lien and execution.
- 7-167. Effect of judgment on appeal.
- 7-168. Entries made by clerk when judgment is rendered.
- 7-169. Justice's judgment removed to another county.
- 7-170. Issue and return of execution.
- 7-171. Levy and lien of execution.
- 7-172. Stay of execution.
- 7-173. Security on stay of execution.
- 7-174. Stay of execution on appeal.
- 7-175. Nature of undertaking.
- 7-176. Execution stayed upon order given.

Article 22.

Appeal.

- 7-177. No new trial; either party may appeal.
- 7-178. Appeal does not stay execution.
- 7-179. Manner of taking appeal.
- 7-180. No written notice of appeal in open court.
- 7-181. Justice's return on appeal.
- 7-182. Defective return amended.
- 7-183. Restitution ordered upon reversal of judgment.

Article 23.

Forms.

- 7-184. Forms to be used in justice's court.

SUBCHAPTER VI. RECORDERS' COURTS.

Article 24.

Municipal Recorders' Courts.

- 7-185. In what cities and towns established; court of record.
- 7-186. Recorder's election and qualification; term of office and salary.
- 7-187. Time and place of holding court.
- 7-188. No subsequent change of judgment.
- 7-189. Procedure in the court.
- 7-190. Criminal jurisdiction.
- 7-191. Jurisdiction to recover penalties.
- 7-192. Disposition of cases when jurisdiction not final.
- 7-193. Disposition of cases when jurisdiction final.
- 7-194. Sentences to be imposed.
- 7-195. Appeal to superior court.

Sec.

- 7-196. Costs paid to the municipality.
- 7-197. Seal of court.
- 7-198. Issuance and service of process.
- 7-199. Vice recorder; election and duties.
- 7-200. Clerk of court; election and duties; removal; fees.
- 7-201. Clerk to keep records.
- 7-202. Clerk to issue process.
- 7-203. Prosecuting attorney; duties and salary.
- 7-204. Jury trial, as in justice's court.
- 7-205. Continuances, recognizances, and transcripts.
- 7-206. Officers' fees; fines and penalties paid.
- 7-207. County to pay for offenders' work on roads.
- 7-208. Prosecutor may be taxed with costs.
- 7-209. Justice of the peace to bind defendants to recorder's court; procedure thereon.
- 7-210. Transfer of certain cases to recorder's court.
- 7-211. Jurisdiction of justice of the peace after three months' delay.
- 7-212. How municipal recorders' courts may be abolished.
- 7-213. Extension of jurisdiction.
- 7-214. Meeting of town and county authorities; election.
- 7-215. Police powers.
- 7-216. Resolution for extension filed with each board as records.
- 7-217. Jurisdiction not to extend to other municipalities.

Article 25.

County Recorders' Courts.

- 7-218. Established by county commissioners.
- 7-219. Recorder's election, qualification, and term of office.
- 7-220. Time and place for holding court.
- 7-221. No subsequent change of judgment.
- 7-222. Criminal jurisdiction.
- 7-223. Jurisdiction and powers as in municipal court.
- 7-224. Removal of cases from justices' courts.
- 7-225. Defendants bound by justice to recorder's court.
- 7-226. Notice to accused of transfer; trial; obligation of bond.
- 7-227. Trials upon warrants; by whom warrants issued.
- 7-228. Jury trial as in municipal court.
- 7-229. Sentence imposed; fines and costs paid.
- 7-230. Appeals to superior court.

CHAPTER 7. COURTS

Sec.

- 7-231. Clerk of superior court ex officio clerk of county recorder's court.
- 7-232. Deputy clerk may be appointed.
- 7-233. Compensation of clerk when no deputy appointed.
- 7-234. Deputy clerk to take oath of office.
- 7-235. Prosecuting attorney may be elected.
- 7-236. Fees for issuing and serving process.
- 7-237. Costs and fees taxed as in municipal court.
- 7-238. Fees taxed when county officer on salary; recorder's court fund.
- 7-239. Courts may be discontinued after two years.

Article 26.

Municipal-County Courts.

- 7-240. Established for entire county.
- 7-241. Election of recorder.
- 7-242. Mayor's jurisdiction continued, when.

Article 27.

Provisions Applicable to All Recorders' Courts.

- 7-243. Appeals from justices of the peace.
- 7-244. Offenders may be sentenced to city chain gang.
- 7-245. Recorders' courts substituted for other special courts.

Article 28.

Civil Jurisdiction of Recorders' Courts.

- 7-246. Civil jurisdiction may be conferred.
- 7-247. Extent of jurisdiction.
- 7-248. Procedure in civil actions.
- 7-249. Trial by jury in civil actions.
- 7-250. Jurors drawn and summoned.
- 7-251. Talesmen and challenges.
- 7-252. Jury as in superior court.
- 7-253. Appeals to superior court.
- 7-254. Enforcement of judgments.
- 7-255. Costs in civil actions.

Article 29.

Elections to Establish Recorders' Courts.

- 7-256. Election required.
- 7-257. Municipal recorder's court.
- 7-258. Notice of election.
- 7-259. New registration may be ordered.
- 7-260. Manner of holding election.
- 7-261. Another election after two years.
- 7-262. Municipal courts with jurisdiction over the entire county.
- 7-263. Expense of elections paid.

Sec.

- 7-264. Certain districts and counties not included.

Article 29A.

Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

- 7-264.1. Establishment of municipal recorders' courts without election.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Article 30.

Establishment, Organization and Jurisdiction.

- 7-265. Establishment authorized; official entitlement; jurisdiction.
- 7-266. Creation by board of commissioners without election.
- 7-267. Abolishing the court.
- 7-268. Transfer of criminal cases.
- 7-269. Transfer of civil cases.
- 7-270. Costs.
- 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.
- 7-272. Terms of court.
- 7-273. Prosecuting officer; duties, election, salary, etc.
- 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.
- 7-275. Sheriff; duties; additional allowance.
- 7-276. Fees of clerk and sheriff.
- 7-277. Separate records to be kept by clerk; blanks, books and stationery.
- 7-278. Criminal jurisdiction, extent.
- 7-279. Civil jurisdiction, extent.
- 7-280. Election, requirement of.
- 7-281. Resolution by county commissioners; time for election; ballots.
- 7-282. Notice of election; publication.
- 7-283. Law governing elections; election officers; registration.
- 7-284. Count and return of votes; canvass of returns; effect; expense.
- 7-285. [Repealed.]

Article 31.

Practice and Procedure.

- 7-286. Procedure; issuance and return of process.
- 7-287. Trial by jury; waiver; deposit for jury fee.
- 7-288. Continuance if jury demanded; drawing of jury; list.
- 7-289. Talesmen; challenges.

CHAPTER 7. COURTS

Sec.

- 7-290. Process; authentication; service; return.
- 7-291. Pleadings; time for filing.
- 7-292. Criminal appeals to superior court; cases bound over to superior court.
- 7-293. Amendments in pleadings and warrants.
- 7-294. Jury trials, conduct of.
- 7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to Supreme Court.
- 7-296. Enforcement of judgments; stay of execution, etc.

Article 32.

District County Courts.

- 7-297. May be established in two or more contiguous counties in same judicial district; jurisdiction.
- 7-298. Judge of court; election; term of office; oath of office and salary.
- 7-299. Present county courts may be changed to district courts.
- 7-300. When court to be held.
- 7-301. Prosecuting attorneys.
- 7-302. Clerks; duties and compensation.
- 7-303. Sheriffs; duties and compensation.
- 7-304. Jurisdiction.
- 7-305. Procedure to establish.
- 7-306. Practice and procedure.
- 7-307. Abolishing the court.

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

Article 33.

With Jurisdiction Not to Exceed \$3000.

- 7-308. Establishment.
- 7-309. Jurisdiction.
- 7-310. Juries in such court; drawing jury; challenges.
- 7-311. Terms; docket.
- 7-312. Witnesses; how summoned.
- 7-313. Appeals.
- 7-314. How actions commenced.
- 7-315. Judgments.
- 7-316. Process of the court.
- 7-317. Removal of cause before justice.
- 7-318. Rules of practice.
- 7-319. Bonds for costs; duties of clerk.
- 7-320. Costs.
- 7-321. Appointment and compensation of judge; substitute; vacancies.
- 7-322. Compensation of clerk; vacancy; files, books, stationery, etc.
- 7-323. Stenographer; fees.
- 7-324. Procedure.
- 7-325. Records.
- 7-326. To be court of record.
- 7-327. Pending cases.

Sec.

- 7-328. First session.
- 7-329. Discontinuance of court.
- 7-330. Existing laws not repealed.
- 7-331. Article not applicable to certain counties.

Article 34.

With Jurisdiction Not to Exceed \$5000.

- 7-332. Establishment.
- 7-333. Qualification, election, and term of judge; office.
- 7-334. Substitute judge.
- 7-335. Terms of court; calendar.
- 7-336. Clerk of court.
- 7-337. Sheriff.
- 7-338. Record; blanks, forms, books, stationery.
- 7-339. Juries.
- 7-340. Jury list; summons.
- 7-341. Talesmen.
- 7-342. Procedure, process, pleadings, etc.
- 7-343. Appeals.
- 7-344. Jurisdiction.
- 7-345. Stenographer; fees.
- 7-346. Disqualification of judge.
- 7-347. Pending cases, transfer.
- 7-348. Abolishing court.
- 7-349. Existing laws not repealed.
- 7-350. Article inapplicable to certain counties.

Article 35.

With Jurisdiction Not to Exceed \$1500.

- 7-351. Establishment.
- 7-352. Qualification of judge.
- 7-353. Appointment of judge; vacancies; substitute judge.
- 7-354. Oath of judge.
- 7-355. Salary of judge.
- 7-356. Disqualification of judge.
- 7-357. Clerk of court.
- 7-358. Oath of clerks.
- 7-359. Appointment and removal of deputies.
- 7-360. Oath and power of deputies.
- 7-361. Sheriff.
- 7-362. Stenographer.
- 7-363. Jury trial.
- 7-364. Waiver of jury trial; jurisdiction concurrent with superior court.
- 7-365. Waiver of jury trial; jurisdiction concurrent with justice of peace.
- 7-366. Jury trial in cases instituted in superior court or before magistrate.
- 7-367. Jury of six; demand and deposit for jury of twelve.
- 7-368. Judge may impanel jury on own motion.
- 7-369. Drawing juries; summons of jurors; pay of jurors.
- 7-370. Talesmen.

CHAPTER 7. COURTS

Sec.

- 7-371. When court opens; terms of court.
- 7-372. Jurisdiction.
- 7-373. Appeals from justice of the peace.
- 7-374. Removal of cause before justice of peace.
- 7-375. Pending cases, transfer.
- 7-376. Records; blanks, forms, books, stationery.
- 7-377. Processes; pleadings; procedure, etc.
- 7-378. Appeal to superior court; time for perfecting appeal; record on appeal; briefs; judgments; appeal to Supreme Court.
- 7-379. Stay of execution; enforcement of judgments, etc.
- 7-380. Court seal.
- 7-381. Costs and fees.
- 7-382. Abolishing court.
- 7-383. Existing laws not repealed.

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Article 36.

County Criminal Courts.

- 7-384. Counties authorized to establish county criminal courts.
- 7-385. Established by resolution of county commissioners.
- 7-386. Court may be abolished by resolution.
- 7-387. Transfer of cases from docket of superior court.
- 7-388. Appointment of judge; associate judge.
- 7-389. Appointment of prosecuting attorney.
- 7-390. Clerk of court; term of office; fees; bond; sheriff.
- 7-391. Oath of judge; prosecuting attorney.
- 7-392. Court seal.
- 7-393. Jurisdiction; appeal; judgment docket.
- 7-394. Jury trials.
- 7-395. Process.
- 7-396. Duties of judge; bond on appeal or on being bound over.
- 7-397. When prosecuting attorney's fee taxed in bill of costs.
- 7-398. Complete record to be kept by clerk; docket.
- 7-399. Warrants returnable to court.
- 7-400. Service fees to officers except where they are on salary.
- 7-401. Regular and special terms; place of sessions.
- 7-402. Judge and prosecuting attorney may practice law in other courts.
- 7-403. Other county court acts not affected.

Sec.

- 7-404. Certain counties excepted from provisions of article.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Article 37.

Special County Courts.

- 7-405. Establishment upon resolution of county commissioners.
- 7-406. Qualifications of judge and solicitor.
- 7-407. Appointment of judge.
- 7-408. Appointment of prosecuting attorney and clerk.
- 7-409. Appointment of acting attorney or judge in absence of regular official.
- 7-410. Compensation of judge and solicitor.
- 7-411. Oaths of judge and solicitor.
- 7-412. Appointment of temporary judge, etc.
- 7-413. Duties and liabilities of clerk.
- 7-414. Oath of office of clerk.
- 7-415. Attendance upon court by sheriff or deputies.
- 7-416. Appointment of court stenographer.
- 7-417. Right of jury trial in civil actions.
- 7-418. Jury trial where no written pleadings are filed.
- 7-419. Jury trial where written pleadings are filed.
- 7-420. Jury trial where cases appealed or removed.
- 7-421. Number of jurors; deposit on demand for jury trial.
- 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.
- 7-423. Jury trials in criminal actions.
- 7-424. Talesmen may serve as jurors.
- 7-425. Sessions of court.
- 7-426. Civil jurisdiction of court.
- 7-427. Procedure for hearing of appeals from courts of justices of the peace.
- 7-428. Transfer of cases from superior court.
- 7-429. Separate records, equipment, etc., furnished by commissioners.
- 7-430. Procedure in civil actions.
- 7-431. Orders to stay execution; judgments.
- 7-432. Seal of court.
- 7-433. Costs and fees.
- 7-434. Reopening of cases and modification of judgments.
- 7-435. Criminal jurisdiction.
- 7-436. Judges vested with jurisdiction of municipal recorders.

Sec.

- 7-437. Removal of cases from courts of justices of peace.
- 7-438. Criminal cases bound over by justices of the peace.
- 7-439. Notice to accused person and surety in cases transferred from superior court.
- 7-440. Issuance of warrant in criminal causes.
- 7-441. Punishment upon conviction.
- 7-442. Appeals to superior court.
- 7-443. Fees for issuance and service of warrants.
- 7-444. Costs and fees as county funds.
- 7-445. Abolition of court by resolution of commissioners.
- 7-446. Counties exempt.
- 7-447. Construction of article.

SUBCHAPTER XI. JUDICIAL COUNCIL.

Article 38.

Judicial Council.

Sec.

- 7-448. Establishment and membership.
- 7-449. Terms of office.
- 7-450. Vacancy appointments.
- 7-451. Chairman of council.
- 7-452. Meetings.
- 7-453. Duties of council.
- 7-454. Annual report; submission of recommendations.
- 7-455. Compensation of members.
- 7-456. Executive secretary; stenographer or clerical assistant.

SUBCHAPTER I. SUPREME COURT.

ARTICLE 1.

Organization and Terms.

§ 7-1. **Number of justices.**—The Supreme Court of North Carolina shall consist of a Chief Justice and six associate justices, to be chosen in the manner now prescribed by law. (Const., art. 4, s. 6; Rev., s. 1532; C. S., s. 1403; 1937, c. 16, s. 1.)

Editor's Note.—The 1937 amendment increased the associate justices from four to six in pursuance of authority of the constitutional amendment proposed by Public Laws 1935, c. 444, s. 1, and adopted at the general election of November, 1936.

Historical.—"When first established, the court was composed of three justices, appointed by the general assembly to hold office during good behavior; and the justices themselves appointed one of their

number as Chief Justice. By the Constitution of 1868 the number was increased to five, a Chief Justice and four associate justices, to be elected by popular vote, and to hold office for eight years and until their successors are qualified. By an amendment in 1875 the number was reduced to three, and in 1887 it was again increased to five, as the court is now constituted." 5 N. C. Law Rev. 5.

§ 7-2. **Election and term of office.**—The justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. (Const., art. 4, s. 21; C. S., s. 1404.)

§ 7-3. **Salaries of Supreme Court justices.**—Each justice of the Supreme Court shall be paid an annual salary of fourteen thousand four hundred dollars (\$14,400), payable in equal monthly installments. (Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; Rev., s. 2764; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51; C. S., s. 3883; 1921, c. 25, s. 2; 1925, c. 214; 1927, c. 69, s. 1; 1939, c. 252; 1949, c. 158, s. 1.)

Cross Reference.—For the amount allowed superior court judges for expenses, see § 7-42.

Editor's Note.—The amendments changed the amount of salary and allowance for expenses.

Prior to the 1949 amendment each justice received an annual salary of \$7,500.00

and an additional amount in lieu of expenses. Section 2 of the amendatory act made the compensation provided in the above section effective as of Jan. 1, 1949.

Income Taxes.—See note to Const. Art. IV, § 18.

Justice held not entitled to deduction of living expenses at Raleigh and traveling

expenses between there and his home in computing his taxable income under the federal statute. *Barnhill v. Commissioner of Internal Revenue*, 148 F. (2d) 913 (1945).

§ 7-4. Oath of office.—The justices, before they act as such, shall, before the Governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the Secretary of State, to be safely kept. (1818, c. 963, P. R.; R. C., c. 33, s. 3; Code, s. 955; Rev., s. 1533; C. S., s. 1405.)

Cross References.—As to forms of oath, requirement and form, see Const., Art. see §§ 11-6, 11-7, 11-11. As to penalty for failure, see § 128-5. As to constitutional VI, § 7.

§ 7-5. Name of court; where records to be kept.—The court bears the name and style of The Supreme Court of North Carolina, and is a court of record; and the papers and records belonging to the clerk's office thereof shall be constantly kept within the city of Raleigh. (1805, c. 674, P. R.; 1818, c. 962, P. R.; 1828, c. 13; R. S., c. 33, s. 2; R. C., c. 33, s. 2; Code, s. 954; 1884, c. 660; Rev., s. 1536; C. S., s. 1406.)

A Court of Record. — "The Supreme Court is a court of record, and the clerk who is appointed by the court for a term of eight years, is required to keep the records of the court in his office in Raleigh." See 5 N. C. Law Rev. 5.

Derived from Constitution. — The Su-

preme Court is established by, and derives its jurisdiction from, the Constitution, and its judicial powers and jurisdiction so prescribed, as well as its methods of procedure, are not subject to legislative control. *Rencher v. Anderson*, 93 N. C. 105 (1885).

§ 7-6. Quorum.—Four justices shall constitute a quorum for the transaction of the business of the court. (Code, s. 956; 1889, c. 230; Rev., s. 1534; C. S., s. 1407; 1937, c. 16, s. 2.)

Editor's Note. — Prior to the 1937 amendment three justices constituted a quorum. As to meaning of "the court" in early statute, see *State v. Lane*, 26 N. C. 434 (1844).

§ 7-7. Terms of court.—There shall be held at the seat of government of the State in each year two terms of the Supreme Court, commencing on the first Monday in February and the last Monday in August.

The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. In case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued. (1804, c. 660, P. R.; 1805, c. 674, P. R.; 1818, c. 932, P. R.; 1828, c. 13; R. S., c. 33, s. 2; 1842, c. 15; 1846, cc. 28, 29; R. C., c. 33, s. 2; 1881, c. 178; Code, ss. 953, 954; 1901, c. 660; Rev., ss. 1535, 1536; C. S., s. 1408.)

Editor's Note.—Under the law as it existed prior to 1868, the court held three terms a year, two in Raleigh and one in Morganton. See 5 N. C. Law Rev. 6.

When the Court Has Adjourned. — When the Supreme Court has finished the business of any one term and adjourned, its jurisdiction of a case decided at that term ceases, and it cannot again acquire jurisdiction of it except by petition to rehear or by a new appeal. *State v. Marsh*, 134 N. C. 184, 47 S. E. 6 (1903).

In *Ruffin v. Harrison*, 91 N. C. 398 (1884), it was said, "The court has no power to amend or modify the final de-

cree, entered at the last term, upon an application like this. After final judgment the court cannot disturb it unless upon an application to rehear or for fraud, accident or mistake alleged in an independent action, or perhaps, in some cases a party might be relieved against a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect' within a year after the entry of the same * * * This of course does not imply that the court has not power to correct the entry of its orders, judgments and decrees so as to make them conform to the truth of what the

court did in granting them, or to set aside an irregular judgment in a proper case." *State v. Marsh*, 134 N. C. 184, 47 S. E. 6 (1903) (dis. op.).

ARTICLE 2.

Jurisdiction.

§ 7-8. **Original jurisdiction.**—The Supreme Court has original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. (Const., art. 4, s. 9; Rev., s. 1537; C. S., s. 1409.)

Editor's Note.—This section, conferring jurisdiction on the Supreme Court to render an opinion in cases wherein there are claims against the State, has a rather unique purpose. The principle underlying its enactment is the well established one that a sovereign state cannot be sued without its consent. Heretofore it was questioned whether the court could lend its aid to the legislature in disposing of important questions of law in cases to which the State was a party. *Reynolds v. State*, 64 N. C. 461 (1870). The realization of the necessity of having recourse to the advice of men who were experts in this particular field, and the extreme difficulty with which the legislature, unaided, was confronted, coupled with the fact that persons who asserted that they held legal claims against the sovereign State might here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated, led to the passage of this section. However, the jurisdiction hereby conferred is not without its clean-cut limitations which will appear in the cases following. See also the annotations under N. C. Const., Art. IV, § 9.

Purpose.—The original jurisdiction was conferred upon the Supreme Court for the benefit only of such plaintiffs, and to be used only in such cases, as could not obtain a footing in the courts, by reason of the State's being a party against whom the claims were to be asserted. *Bain v. State*, 86 N. C. 49 (1882).

Nature of Claim.—The claim against the State must be such as, against any other defendant, could be reduced to a judgment and enforced by an execution. *Bain v. State*, 86 N. C. 49 (1882).

Same—Question of Law.—The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved. *Cowles v. State*, 115 N. C. 173, 20 S. E. 384 (1894); *Miller v. State*, 134 N. C. 270, 46 S. E. 514 (1904).

This section is applicable only as to the matters of law involved upon facts agreed to, or made to appear, and the Supreme

Court does not pass upon conflicting evidence to determine the facts at issue. *Reynolds v. State*, 64 N. C. 461 (1870); *Calkins Dredging Co. v. State*, 191 N. C. 243, 131 S. E. 665 (1926). The adjudication is of the legal validity of the claims. *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153 (1889).

Court Cannot Enforce Judgments.—No power to enforce its judgment is given the court; its decisions are merely recommendatory to the legislature, which may provide for the enforcement of the claims if it see proper to do so. *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153 (1889).

The Supreme Court renders no judgment in a proceeding in which original jurisdiction is invoked under Const., Art. 4, § 9, nor has it power to enforce its decision made in such proceeding by process in nature of execution. Its decision is merely recommendatory. *Rotan v. State*, 195 N. C. 291, 141 S. E. 733 (1928).

Recovery of Taxes.—When nonresident executors have failed to proceed in the superior court, under § 105-406, to recover an amount they have paid as an inheritance tax to the State of North Carolina, the method by which the legislature has authorized the State to be sued is exclusive, and the recommendatory original jurisdiction of the Supreme Court may not be invoked. *Rotan v. State*, 195 N. C. 291, 141 S. E. 733 (1928).

Transmission to General Assembly.—Upon the decision of the Supreme Court in favor of the plaintiff upon a claim preferred against the State, the proper course is for the clerk to transmit the proceedings in the cause, together with the judgment of the court, to the Governor to be communicated by him to the General Assembly. *Clements v. State*, 77 N. C. 142 (1877); *Horne v. State*, 82 N. C. 382 (1880).

State May Plead Statute of Limitations.—In proceedings under this section the State has the right to plead the bar of the statute of limitations to prevent a recommendatory decision. *Cowles v. State*, 115 N. C. 173, 20 S. E. 384 (1894), wherein

the court said: "It is not for us here to say whether or not there is a moral obligation resting upon the Commonwealth to pay the petitioner a certain sum of money, but whether, under the law that controls such a controversy, when waged between two citizens, the State is indebted to their petitioning citizen."

Set-off and Counterclaim.—A person indebted to the State, and sued on such

indebtedness cannot offer as a set-off or counterclaim the indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owes. It is otherwise when the claim is in the nature of a payment or credit. *Battle v. Thompson*, 65 N. C. 406 (1871). See also, *Lindsay v. King*, 23 N. C. 401 (1841).

§ 7-9. Procedure to enforce claims against the State.—Any person having any claim against the State may file his complaint in the office of the clerk of the Supreme Court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the Governor, and therein request him to appear on behalf of the State and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the State by the Governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the Supreme Court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the Supreme Court. If the State shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The Supreme Court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the General Assembly at its next term. (Rev., s. 1538; Code, s. 948; C. S., s. 1410.)

Editor's Note.—This section was first enacted by the General Assembly in 1868. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928).

In General.—In these proceedings the rights of the petitioner and the liability of the State are determined by the same laws that would govern those rights and that liability if the action were against an individual debtor. *Cowles v. State*, 115 N. C. 173, 20 S. E. 384 (1894).

The Supreme Court, as a rule, will consider only such claims as present serious questions of law and will not take the burden of passing upon those claims which involve mainly issues or questions of fact, although in proper cases the court may order that issues of fact be tried in the superior court, as provided in this section. *Cohoon v. State*, 201 N. C. 312, 160 S. E. 183 (1931).

The recommendatory or original jurisdiction of the court is confined to claims in which it is supposed that an opinion of an important question of law would be of aid to the General Assembly in determining the merits of a claim against the State. This is true notwithstanding the broad provision of this section that any person having any claim against the State may commence the proceeding by filing his complaint. *Cohoon v. State*, 201 N. C.

312, 160 S. E. 183 (1931).

The Supreme Court is given original jurisdiction to hear claims against the State, but its decisions are merely recommendatory, and no process in the nature of execution shall issue thereon. *Cohoon v. State*, 201 N. C. 312, 160 S. E. 183 (1931).

The procedure thus authorized is prescribed by this section, but this procedure must not be construed as exceeding the power conferred upon the Supreme Court by the organic law. *Cohoon v. State*, 201 N. C. 312, 160 S. E. 183 (1931).

Construction of Section.—Insofar as this section provides for and prescribes the procedure by which a claimant may invoke the original jurisdiction of the Supreme Court, conferred by the Constitution, with respect to his claim against the State, it is valid, and enforceable in all respects; when, however, a proceeding has been duly instituted and filed in the Supreme Court, in accordance with the provisions of the statute, the procedure by which the court will thereafter exercise its power to hear and decide upon the claim is not controlled by the statute. When it appears that an issue or question of law is presented which can be intelligently decided, without determining facts in issue, the court will proceed to hear and decide such issue or question of law. When it appears that

there is no issue or question of law involved no decision will be made and the proceeding will be dismissed. When, however, in order to decide an issue or question of law involved, the court deems it best to have issues of fact first determined, the court may or may not follow the provisions of the statute with respect to a trial by jury of such issues. The statute is at most, in this respect, directory. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928).

Ascertainment of Facts.—The facts are ascertained by reference to the clerk of the

Supreme Court or by transferring the issue to a superior court for trial by jury, and when sufficiently informed of the facts the Supreme Court will declare the law. *Bledsoe v. State*, 64 N. C. 392 (1870); *Clements v. State*, 76 N. C. 199 (1877).

The Court Cannot Enforce Its Judgments.—See note of *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153 (1889), under § 7-8.

Duty of Clerk after Decision.—See note of *Clements v. State*, 77 N. C. 142 (1877), under § 7-8.

Cited in *Rotan v. State*, 195 N. C. 291, 141 S. E. 733 (1928).

§ 7-10. Appellate jurisdiction.—The Supreme Court has jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over “issues of fact” and “questions of fact” is the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the court has the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. (Const., art. 4, s. 8; Rev., s. 1539; C. S., s. 1411.)

- I. In General.
- II. Issues and Questions of Fact.
 - A. In General.
 - B. Jurisdictional Requisites.
 - C. The Principles Applied.
- III. Jury Trial.

Cross Reference.

As to appeals from superior court judges, see also § 1-277.

I. IN GENERAL.

Editor's Note.—See notes under Const., Art. 4, § 8. The provisions of this section are, in substance, quite similar to those contained in § 1-277. Practically the only distinguishing feature is that this section provides for the jurisdiction of the Supreme Court over “issues of fact” and “questions of fact,” making it the same as was exercised by the court prior to the adoption of the Constitution of one thousand eight hundred and sixty-eight. It is thought more advisable and expedient to place the major annotations under § 1-277, to which reference is hereby made, and to confine the notes to this section to those cases bearing upon the last provision herein contained.

In General.—In our practice, both before and since the establishment of the Constitution of 1868, the Supreme Court has all the power which a court of errors had at common law. *Rush v. Steamboat Co.*, 68 N. C. 72 (1873).

Ruling on Question in Lower Court Essential.—The appellate jurisdiction of the Supreme Court is limited to the correction of errors in the rulings below, and when there has been no ruling thereon be-

low, the court cannot pass upon a question presented by the record. *Tyson v. Tyson*, 100 N. C. 360, 6 S. E. 707 (1888).

Same—Exceptions to Referee's Report.—It is required of the trial judge to review and pass upon exceptions to a report of a referee as to the facts found and the conclusions of law thereon, and a pro forma judgment entered by him for any reason cannot be reviewed by the Supreme Court on appeal under this section for it is only decisions of the lower courts which may thus be considered. *Overman v. Lanier*, 156 N. C. 537, 72 S. E. 575 (1911).

An Appeal Essential.—The Supreme Court being strictly an appellate court, except as to claims against the State, its jurisdiction is acquired only by reason of the appeal. *James v. Western, etc., R. R.*, 123 N. C. 299, 31 S. E. 707 (1898).

Record Controlling.—On appeal, the record controls as to facts stated therein. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100 (1918); *Southerland v. Brown*, 176 N. C. 187, 96 S. E. 946 (1918).

In case of conflict as to occurrences, at the trial, the record will prevail. *McDonald v. McLendon*, 173 N. C. 172, 91 S. E. 1017 (1917); *Howard v. Wright*, 173 N. C. 339, 91 S. E. 1032 (1917); *Bell v. Harrison*, 179 N. C. 190, 102 S. E. 200 (1920).

Second Appeal.—The Supreme Court will not ex mero motu review a former decision upon a second appeal in the same case. *Best v. British, etc., Mortgage Co.*, 131 N. C. 70, 42 S. E. 456 (1902). But the court, on the second appeal, is not precluded under the doctrine of the law of the case from passing on a question not de-

terminated on the first appeal. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904).

Same—Party Harmed. — The Supreme Court will not review a ruling of its own, which does not affect injuriously the complaining party, even where the ruling is erroneous. *Balk v. Harris*, 132 N. C. 10, 43 S. E. 477 (1903).

II. ISSUES AND QUESTIONS OF FACT.

A. In General.

Defined.—Issues of fact on those matters alleged on one side and denied on the other, and every question presented under these issues necessary to decide the matter in controversy should be presented to the jury. *Kirk v. Atlanta, etc., Ry. Co.*, 97 N. C. 82, 2 S. E. 536 (1887).

Power of Court.—“The power of the appellate court to review the facts is limited to matters exclusively of equitable cognizance under the former system, and in such cases only when the evidence is written and documentary, so that the higher court is in the same position as the court below.” 5 N. C. Law Rev. 16. See also *State v. Lilliston*, 141 N. C. 857, 54 S. E. 427 (1906).

B. Jurisdictional Requisites.

When Jurisdiction Assumed.—The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary, and in all respects the same as they were when the judge of the court below passed upon them. *Worthy v. Shields*, 90 N. C. 192 (1884).

Since this decision the courts have consistently followed the two foregoing propositions, and have made the two principles conditions precedent to the valid exercise of a hearing on appeal. It necessarily follows from these rules that, (1) if the question presented on appeal is not strictly of an equitable nature, or (2) if the proofs are not written and documentary and in the same form as they were presented to the lower court, then it is not a case over which the Supreme Court can exercise jurisdiction. Herein lies the principle on which the court on appeal has refused to take cognizance of “issues of fact,” which were in the court below, tried by a jury, for a fortiori the second proposition noted above will not have been fulfilled. The basis for the exclusion of such “issues of fact” would seem to be that the jury, with all the witnesses before them, are in a bet-

ter position to weigh all the material evidence and can better reach the logical solution to the issue in controversy. See *Cameron v. Highway Com'r*, 188 N. C. 84, 123 S. E. 465 (1924); *Howard v. Board*, 189 N. C. 675, 127 S. E. 704 (1925).

C. The Principles Applied.

Judgment Must Be Equitable in Nature.—The jurisdiction of the Supreme Court over “issues of fact,” is restricted to interlocutory and final judgments which are exclusively equitable in their nature, and which a court of equity as a distinct and separate tribunal could alone render, under the former system. *Young v. Rollins*, 90 N. C. 125 (1884).

This jurisdiction does not extend to a case which under the former practice would have been an action at law, and in which only errors of law could have been corrected on appeal. *State v. Scott*, 84 N. C. 184 (1881).

Same—Motion for Injunction. — On a motion for an injunction, being an application for equitable relief, it is the right and duty of the Supreme Court, under this section, on an appeal from an order granting or refusing the injunction, to determine the questions of fact as well as of law upon which the propriety of the order depends. *Jones v. Boyd*, 80 N. C. 258 (1879).

Same—Former Acquittal. — No appeal can be taken by the State to any court from the action of an inferior court in sustaining a plea of former acquittal, although such plea is a mixed question of law and fact, and the court erred in not leaving it to the jury. *State v. Lane*, 78 N. C. 547 (1878).

Same—Action of Covenant. — Whether an action of covenant which was strictly an action at law under the former system, but to which an equitable defense can now be made under the new system, falls within the operation of this section was left undecided by the court in *Gragg v. Wagner*, 77 N. C. 246 (1877).

When there is any evidence proper to be submitted to the jury, the Supreme Court has no power to interfere with the verdict. *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954 (1905).

All the Evidence Must Be Sent Up.—The Supreme Court has no jurisdiction, on appeal, to review the evidence and findings of fact of the lower court in an equitable action, unless the same evidence, and the whole of it just as taken below, is sent to such court. *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635 (1888).

III. JURY TRIAL.

Generally.—In *Leggett v. Leggett*, 88 N. C. 108 (1883), some doubt is cast upon the question whether, under the provisions of this section in reference to the jurisdiction of the court over “issues of fact” and “questions of fact,” a party has the right to have a cause, heretofore cognizable only

in a court of equity, tried by the court without the intervention of a jury.

Same—Estoppel.—But where, in such case, a party has of his own accord accepted a trial by jury, he cannot afterwards have the same facts passed upon by the court. *Leggett v. Leggett*, 88 N. C. 108 (1883).

§ 7-11. **Power to render judgment and issue execution.**—In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the Supreme Court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided, also, that in criminal cases the decision of the Supreme Court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the Supreme Court and the laws of the State. (1799, c. 520, P. R.; 1818, c. 963, P. R.; 1830, c. 2; R. C., c. 33, s. 6; 1868-9, c. 962; Code, s. 957; Rev., s. 1542; C. S., s. 1412.)

I. In General.

II. Exceptions.

III. Effect of Decision.

A. In General.

B. Power of Superior Court.

I. IN GENERAL.

Cross Reference.—See § 1-297 and note.

Editor's Note.—See comment in 13 N. C. Law Rev. 343, wherein it is suggested that this section be invoked to prevent useless nonsuits.

Affirmance as to One Defendant and Dismissal as to Other.—Under the technical rules of the common law a different rule prevailed, from that prescribed by this section and § 1-297, but the court of equity always followed this procedure, which was adopted by this State when the distinction between law and equity was abolished. One court having taken place of both law and equity, a joint judgment may be affirmed as to one defendant, and dismissed as to another. This has been the uniform course and practice since the blending of the two forms of procedure, and is expressly authorized by the sections cited above. The same practice has been followed in the courts of the other states which have adopted the modern system of practice. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11 (1921).

Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues

have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of § 1-297 and this section. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11 (1921).

Errors in Pleadings, etc.—This section requiring the Supreme Court to give such judgment as shall appear to be proper from an “inspection of the whole record” has reference only to essential parts of the record as pleadings, verdict and judgment, in which, if there be error, the court will correct it, though it be not assigned. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513 (1889). See also *Wynne v. Atlantic, etc., R. Co.*, 182 N. C. 253, 109 S. E. 19 (1921).

The Supreme Court ought not to render judgment upon an aspect of the case not presented by the pleadings. *Oakley v. Noppen*, 95 N. C. 60 (1886); *Bush v. Hall*, 95 N. C. 82 (1886); *Morrison v. Watson*, 95 N. C. 479 (1886).

Except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. *Hill v. Director General, etc.*, 178 N. C. 607, 101 S. E. 376 (1919). Especially is this true where the change of front is sought to be made between the trial and appellate courts. In-

gram v. Yadkin River Power Co., 181 N. C. 359, 107 S. E. 209 (1921).

Theory of Lower Court Adopted.—A case is heard and determined in the Supreme Court according to the theory on which it was tried below. *Warren v. Susman*, 168 N. C. 457, 84 S. E. 760 (1915); *Coble v. Barringer*, 171 N. C. 445, 88 S. E. 518 (1916).

Sufficiency of Record Must Be Apparent.—The Supreme Court renders judgment upon an inspection of the whole record, and must therefore, be satisfied of the sufficiency of each record. *State v. Daniel*, 121 N. C. 574, 28 S. E. 255 (1897).

Judgment in Lower Court Essential.—When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. It must also appear that the court was lawfully organized and held, and all the proceedings had in the action arranged in an orderly manner. *Boardfoot v. McKeithan*, 92 N. C. 561 (1885).

Proceedings to Modify Judgment.—A judgment of the superior court may be modified on appeal where the plaintiff's right to remove adverse claims as a cloud upon his title to lands has been established, so as to enjoin, upon the defendant's appeal, actions pending in the superior court involving the same equity and the same subject matter, where the parties thereto have been made parties to the case at bar, the proceedings being in the nature of a bill of peace. *Ormand Mining Co. v. Gambrill, etc., Mills Co.*, 181 N. C. 361, 107 S. E. 216 (1921).

Parties Not Appealing or Complaining.—Although the plaintiff does not appeal the appellate court may afford him relief upon defendant's appeal, because, by the terms of this section, it should render such judgment as "on an inspection of the whole record it shall appear to them ought in law to be rendered." *Ormand Mining Co. v. Gambrill, etc., Mills Co.*, 181 N. C. 361, 107 S. E. 216 (1921).

Errors Which Have to Be Assigned.—Under the provisions of this section the appellate court is required to take notice of all errors appearing upon the face of the record proper, such as defects in the summons, pleadings and the judgment, even though such errors are not assigned. *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910 (1888); *Wilson v. Beaufort Lumber Co.*, 131 N. C. 163, 42 S. E. 565 (1902). When other matters are relied upon, they must be pointed out by an exception on the trial or in the case on appeal. *State v. Cowan*, 29 N. C. 239 (1847);

State v. Ashford, 120 N. C. 588, 26 S. E. 915 (1897). See *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74 (1936).

II. EXCEPTIONS.

In General.—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126 (1924).

Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175 (1927).

The Supreme Court cannot consider a question not considered by the trial court, and not affecting the verdict appealed from. *Williamson Co. v. Canaday*, 25 N. C. 349 (1843); *Kennedy v. Johnson*, 69 N. C. 249 (1873); *Herring v. Warwick*, 155 N. C. 345, 71 S. E. 462 (1911).

Error Apparent on Record.—The rule which forbids the hearing of an objection not taken, and which ought to have been taken, at the trial, does not embrace the case where the judge misdirects the jury upon a material question of law, injuriously to the appellant. *Burton v. Wilmington, etc., R. Co.*, 84 N. C. 193 (1881).

Where error is manifest on the face of the record, even though it be not the subject of an exception, the Supreme Court may correct it *ex mero motu*. *Gibson v. Central Mfrs' Mut. Ins. Co.*, 232 N. C. 712, 63 S. E. (2d) 320 (1950).

Failure to State Cause of Action.—An objection that the complaint does not state a cause of action may be taken advantage of at any time, even in the Supreme Court on appeal. *Tucker v. Baker*, 86 N. C. 1 (1882); *Jackson v. Jackson*, 105 N. C. 433, 11 S. E. 173 (1890); *Baker v. Garriss*, 108 N. C. 218, 13 S. E. 2 (1891); *McDonald v. MacArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832 (1910).

Venue.—In an action against the board of commissioners of one county, brought to the superior court of an adjoining county, objection to the venue must be taken in the trial court, otherwise the objection will be considered as waived. *Edwards v. Board*, 70 N. C. 571 (1874). See also, *McMinn v. Hamilton*, 77 N. C. 300 (1877).

Answer to Excluded Questions.—Assignments of error to exclusion of questions asked cannot be considered, where the record does not indicate what the answers would have been. *Bryant Timber Co. v. Tilghman Lumber Co.*, 168 N. C. 154, 84 S. E. 765 (1914); *Brinkley v. Norfolk Southern R. Co.*, 168 N. C. 428, 84 S. E.

700 (1915); *Smith v. Commissioners*, 176 N. C. 466, 97 S. E. 378 (1918).

No Presumption of Error.—An assignment of error, to be considered, must be based upon an exception previously taken and appearing in the record, for the court will not presume error. *Bailey v. Justice*, 174 N. C. 753, 94 S. E. 518 (1917).

Where No Exceptions Appear.—No exceptions will be considered on appeal except such as appear in the record and were made in the court below. *Phipps v. Pierce*, 94 N. C. 514 (1886); *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266 (1890).

Where, by consent of the parties, the judge frames the issue at the close of the testimony and no exception is made on the trial to such issues or to the evidence or charge, objection cannot be raised on appeal that the issues submitted were not such as arose on the pleadings. Exception to the issues should be made on the trial so that the judge may, if he thinks proper, revise and correct them. *Wills v. Fisher*, 112 N. C. 529, 17 S. E. 73 (1893).

III. EFFECT OF DECISION.

A. In General.

Decision Fixes the Law.—The decision of the Supreme Court becomes the law of the case upon the second trial. *Davis v. Hilton Lumber Co.*, 190 N. C. 873, 130 S. E. 156 (1925). It is the duty of the superior court to proceed with the case in accordance with this decision and the principles established by the Supreme Court. *James v. Western, etc.*, R. R., 123 N. C. 299, 31 S. E. 707 (1898); *Ray v. Veneer Co.*, 188 N. C. 414, 124 S. E. 756 (1924).

The Decision Certified.—The requirement of this section that the Supreme Court transmit its "decision" means the results reached by the court, and there is no provision requiring the clerk to certify to a court below the opinion of the court. *State v. Ketchy*, 71 N. C. 148 (1874).

Certified Opinion—Appeal from Interlocutory Orders.—See § 7-12.

Final Judgment.—Final judgment may be rendered in the Supreme Court. *Al-*

spaugh v. Winstead, 79 N. C. 526 (1878). But where the case is sent back to the lower court it is within the discretion of the trial judge to permit the filing of a verified answer where there was a failure to do so in the first instance. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 16 S. E. 423 (1892).

B. Power of Superior Court.

Power Limited.—The superior court has no power to modify or change a judgment or decree of the Supreme Court certified to the court below. Its powers are confined to incidental matters of detail necessary to carry the decree into effect, not inconsistent therewith. The rule that the superior courts have authority to vacate or modify decrees made in a cause, at any time before final judgment, does not apply here. *Murrill v. Murrill*, 90 N. C. 120 (1884).

When a final judgment is rendered in the Supreme Court upon an appeal from a final judgment in the superior court, the latter court has power to issue no other process in the case than an execution for its own costs. *Grissett v. Smith*, 61 N. C. 297 (1867).

Judgment for Costs.—Judgment for costs in the Supreme Court is rendered in that court, the superior court has no jurisdiction in that matter. *Johnson v. Danville, etc.*, R. R., 109 N. C. 504, 13 S. E. 881 (1891); *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801 (1912). See § 6-33 and the notes thereto.

Motion for New Trial.—Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the judgment has been certified to the clerk of the superior court, under this section and § 7-16, the case is in the latter court for the purpose of the execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (1931); *State v. Cox*, 202 N. C. 378, 162 S. E. 907 (1932).

§ 7-12. No judgment on interlocutory order; opinion certified.—When an appeal is taken to the Supreme Court from any interlocutory judgment, the Supreme Court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions. (Code, s. 962; Rev., s. 1544; C. S., s. 1413.)

Interlocutory Order Defined.—See § 1-208 and note.

Procedure Explained.—The appeal, like a writ of error, does not disturb the in-

interlocutory order, but suspends action on it, intended to carry it into effect, until its legality is tested in the court above, and this being decided and certified to the superior court, then, if sustained, that court is directed to proceed upon the judgment as already existing; or if declared erroneous, to reverse or modify it, in conformity to the law declared. *Green v. Griffin*, 95 N. C. 50 (1886).

Effect of Appeal.—Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause, carry up for review only the ruling of the court upon that specific point. The order of judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined. Meanwhile the action remains in the court below. *Green v. Griffin*, 95 N. C. 50 (1886).

If the appeal is from an interlocutory order the cause does not come up to the Supreme Court, but only the order, which is decided and the decision certified to the superior court, to the end that the cause may be proceeded with. *Perry v. Tupper*, 71 N. C. 380 (1874).

Substantial Right Affected.—Before an appeal should be taken from an interlocutory judgment or order, it should affect some substantial right of the appellant. *Rogerson v. Lumber Co.*, 136 N. C. 266, 48 S. E. 647 (1904).

Same—Discretion of Court.—However, even though there may be some doubt as to whether an appeal will lie from the

interlocutory order, the court may, in its discretion, hear and decide the matter presented. *Best v. Best*, 161 N. C. 513, 77 S. E. 762 (1913); *Barnes v. Fort*, 169 N. C. 431, 86 S. E. 340 (1915).

Motion to Dismiss.—An appeal from the refusal of a motion to dismiss an action is premature and will not lie; the proper procedure is for the movement to except, reserve exceptions and appeal from the adverse decision. *Bradshaw v. Citizens Nat. Bank*, 172 N. C. 632, 90 S. E. 789 (1916).

Criminal Action.—In a criminal action there is no appeal save from a final judgment. *State v. Nash*, 97 N. C. 514, 2 S. E. 645 (1887). And when the record does not show a final judgment the appeal will be dismissed. *State v. Hazell*, 95 N. C. 623 (1886).

Motions.—All proper motions in the action should be made in the superior court, except such motion as may be made affecting the appeal and the action of the Supreme Court therein. *Stephens v. Koonce*, 106 N. C. 222, 10 S. E. 996 (1890).

As to the binding force of the appellate court's decision when certified, see note of *Murrill v. Murrill*, 90 N. C. 120 (1884), under § 7-11.

When Error Committed by Supreme Court.—If the Supreme Court issues an irregular order, neither the judge of the superior court nor the litigating parties can frustrate it; the remedy is by a petition to the Supreme Court to rehear. *Perry v. Tupper*, 71 N. C. 380 (1874).

§ 7-13. Power of amendment and to require further testimony.—The Supreme Court has power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment; and to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And whenever it appears necessary for the purpose of justice, the court may allow and direct the taking of further testimony in any case which may be pending in the court, under such rules as may be prescribed, or may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below. (1777, c. 115, s. 75, P. R.; 1785, c. 233, P. R.; 1792, c. 360, P. R.; 1831, c. 46; R. C., c. 33, s. 17; Code, s. 965; Rev., s. 1545; C. S., s. 1414.)

- I. In General.
- II. Pleading.
- III. Parties.
- IV. Case Remanded.

Cross Reference.

See also § 1-163.

I. IN GENERAL.

Extent of Power.—The Supreme Court can amend as fully as the superior court, and in the same instances. *Perry v. Perry*,

175 N. C. 141, 95 S. E. 98 (1918).

But where the amendment is of such nature that, to allow it would make the record not conform to or correspond with the facts developed on the trial below, and would be in contradiction of the evidence adduced, and the theory upon which the trial must have proceeded, then the amendment will not be allowed. See *Huyett, etc., Mfg. Co. v. Gray*, 126 N. C. 108, 35 S. E. 236 (1900).

Same—Facts Cannot Be Found.—Under

the provisions of this section the Supreme Court cannot find the facts. All it can do is to remand the case to the end that the lower court can discover them. *Bank v. Blossom*, 89 N. C. 341 (1883).

After Final Judgment.—The Supreme Court has no power to direct or allow amendments to the record after a final judgment therein has been rendered. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566 (1888).

Different Case Presented.—The power to amend will not be exercised where the amendment would, perhaps, present a case substantially different from the one tried below and raise a question of law not involved in the present appeal. *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781 (1905).

Cited in *Lipe v. Citizens' Bank, etc., Co.*, 206 N. C. 24, 173 S. E. 316 (1934); *Byers v. Byers*, 222 N. C. 298, 22 S. E. (2d) 902 (1942).

II. PLEADING.

When Nonresident Petitions for Removal.—Where a nonresident defendant claims an interest in lands, in proceedings by a municipality against a resident owner to take it for a public use, and the nonresident has been made a party and files his petition and bond for removal to the federal court for diversity of citizenship, the plaintiff may amend his pleadings on motion granted by the State court, under this section, and set up facts sufficient to show that the claim of the nonresident arose by contract that gave him no interest in the lands within the meaning of the Federal Removal Act. *Morganton v. Hutton, etc., Co.*, 187 N. C. 736, 122 S. E. 842 (1924).

Pleading by Guardian.—Where an infant entered a certain pleading by her next friend when it should have been made by her guardian, the objection thereto was such a technical one that it was disregarded, although the court specifically says that had the objection any force whatever, the mistake could readily be cured by allowing an amendment to be made. *Hollomon v. Hollomon*, 125 N. C. 29, 34 S. E. 99 (1899).

Explanation by Parol Proof.—Where a description in a deed is not so uncertain and vague as to render it void, the Supreme Court, where justice requires it, may allow the uncertain part to be aided by parol proof. *Allen v. Sallinger*, 108 N. C. 159, 12 S. E. 896 (1891).

Inadvertence of Judge.—While a judge cannot resettle a case on appeal, yet, where the ends of justice require it, it is his duty to correct such errors as have resulted

from inadvertence, mistake, misapprehension, or the like. *People v. Teague*, 106 N. C. 571, 11 S. E. 330 (1890).

Action on Administration Bond.—An objection in the Supreme Court that the action on an administration bond was not brought in the name of the State may be obviated by a motion to amend under this section. *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707 (1889). But such an amendment will not be allowed when it would destroy a just and legal ground of the appeal which existed when the objection thereto was taken. *Grant v. Rogers*, 94 N. C. 756 (1886).

Failure to File Replication.—Where the plaintiff, in a suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was held, a waiver by the defendant of a replication, and the court allowed an amendment under this section. *Fleming v. Murphy*, 59 N. C. 59 (1860).

Amendment of Answer.—The Supreme Court has the power to grant a motion by defendant to be allowed to amend his answer, but the motion is denied where the matter sought to be alleged by amendment is immaterial to the defense. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

III. PARTIES.

The Rule Stated.—A bill can be amended as to parties in the Supreme Court. *Kent v. Bottoms*, 56 N. C. 69 (1856).

Same—Guardian ad Litem.—The power to make parties includes the power to appoint a guardian ad litem. It is useless to remand the case for such appointment where the interests of the children have been duly protected by petitioner. *Perry v. Perry*, 175 N. C. 141, 95 S. E. 98 (1918).

Personal Representative.—Where a claim under the Workmen's Compensation Act has been litigated in the name of the deceased it is not permissible under this section for the personal representative of the deceased, hereafter to be appointed, to come in and make himself a party to the proceeding in the Supreme Court. *Hunt v. State*, 201 N. C. 37, 158 S. E. 703 (1931).

Opposite Party Harmed.—While an amendment substituting parties can be allowed in the Supreme Court, it will not be allowed when it will put the opposite party to a disadvantage. *Hodge v. Marietta, etc., R. R.*, 108 N. C. 24, 12 S. E. 1041 (1891).

IV. CASE REMANDED.

In General.—The Supreme Court has

the power, in a proper case, to remand causes to the end that proper amendments may be made, or further proceedings taken in the court below. *Holley v. Holley*, 96 N. C. 229, 1 S. E. 553 (1887).

Essentials of Transcript Lacking.—Where the transcript of the record fails to set forth facts necessary for the determination of the case on appeal, it will be remanded to the end that the same may be supplied or found by the court below, as the nature of the cause may require. *Bank v. Blossom*, 89 N. C. 341 (1883).

Requisites of Transcript.—See § 1-284

§ 7-14. **Proof of exhibits.**—Exhibits or other documents relative to cases pending in the Supreme Court may be proved by the parol testimony of witnesses to be examined in the court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court, and suitors in the court may have subpoenas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: Provided, that witnesses attending the Supreme Court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned. (1820, c. 1070, P. R.; 1825, c. 1282, P. R.; 1842, c. 1; R. C., c. 33, s. 21; Code, s. 963; Rev., s. 1547; C. S., s. 1415.)

Regular Practice Explained.—Though witnesses in some instances may be summoned, it has not been the practice. Owing both to the great addition it would make to the already large and steadily increasing volume of business in this court to examine affidavits on questions of fact, the court

and note.

Insanity of Plaintiff.—Where after an appeal and before a hearing, the plaintiff became insane and was committed to an asylum, it was held that the case must be remanded. *Jones v. Cotten*, 108 N. C. 457, 13 S. E. 161 (1891).

Jury Trial.—Upon allegation of inadvertence in including a supersedeas bond in the appeal bond, an issue therein may be remanded to the superior court to be tried by jury. *Burnett v. Nicholson*, 86 N. C. 728 (1882).

has adhered to its settled ruling, that it will not pass upon the facts, except as to injunctions and in similar cases, but will take the findings of fact by the judge who tried the cause below as conclusive. In *re Deaton*, 105 N. C. 59, 11 S. E. 244 (1890).

§ 7-15. **Opinions and judgments to be in writing.**—The justices shall deliver their opinions and judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary. (1810, c. 785, P. R.; R. C., c. 33, s. 16; Code, s. 964; 1893, c. 379, s. 5; Rev., s. 1548; C. S., s. 1416.)

Editor's Note.—Under the law as it stood prior to 1868, the opinions of the judges were required to be in writing, "with reasons at full length upon which they are founded," the purpose and intent of the statute being to prevent per curiam opinion. Subsequently the statute was amended and the requirement of "reasons at full length, etc.," was omitted. Still later (in 1893) it was left within the discretion of the judges by the addition of the proviso to decide when the opinions were to be written. This is the situation under the law as it stands today. It has been held in at least one case that, even in the absence of the statutory provision

placing their discretionary power in the court, such power exists by force of the constitutional provision giving the court the right to make its own rules of practice. *State v. Council*, 129 N. C. 511, 39 S. E. 814 (1901). See also 5 N. C. Law Rev. 20.

Discretion of Court.—The filing of a written opinion in a case is discretionary with the Supreme Court. *Parker v. Atlantic, etc.*, R. R., 133 N. C. 335, 45 S. E. 638 (1903).

The writing of the reason at length is discretionary with the court. *Bradsher v. Cheek*, 112 N. C. 838, 17 S. E. 533 (1893).

A judgment may be affirmed without

extended opinion. *Rogen v. Luff*, 202 N. C. 819, 161 S. E. 924 (1932).

Applied, opinion deemed necessary, in

Wootton v. McGinnis, 201 N. C. 841, 161 S. E. 926 (1931); *Thrash v. Roberts*, 201 N. C. 843, 161 S. E. 925 (1931).

§ 7-16. Certificates to superior courts; execution for costs; penalty.—The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the Supreme Court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the Supreme Court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the Supreme Court shall have decided, one hundred dollars. (1820, c. 1070, P. R.; 1825, c. 1282, P. R.; 1842, c. 1, s. 3; R. C., c. 33, s. 21; Code, s. 968; 1887, c. 41; Rev., s. 1549; C. S., s. 1417.)

Cross Reference.—See note to § 7-11.

Editor's Note.—This and § 7-18 are in *pari materia* and must be construed together. See *Emery v. Raleigh, etc.*, R. R., 102 N. C. 234, 10 S. E. 141 (1889).

By virtue of this section opinions are certified down on the first Monday in each month, provided they shall have been on file ten days. As opinions are usually filed on Tuesdays, they remain not less than thirteen days and not more than forty-two days in *feri*, and, in that time, if there is error (and in criminal cases it should be scrutinized in that time), it can be observed and the matter called to the attention of the court, which, in such cases, on sufficient cause shown, has more than once called up the opinion for reconsideration. If this is not done, the remedy is by application to the Governor. *State v. Council*, 129 N. C. 511, 39 S. E. 814 (1901).

Effect of Certifying Case.—When the

Supreme Court has certified its decision to the court below for judgment there, this court has no further jurisdiction of the case. *James v. Western, etc.*, R. R., 123 N. C. 299, 31 S. E. 707 (1898).

Case Certified in Advance of Statutory Time.—The court in its judgment may direct an opinion certified down in advance of the statutory time. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268 (1890).

Costs.—Judgment for costs in the Supreme Court is rendered in that court; the superior court has no jurisdiction in the matter. *Johnson v. Danville, etc.*, R. R., 109 N. C. 504, 13 S. E. 881 (1891). See § 6-33 and the note thereto.

Applied in *Commissioner of Banks v. Harvey*, 202 N. C. 380, 162 S. E. 894 (1932).

Cited in *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929); *Cannon v. Cannon*, 226 N. C. 634, 39 S. E. (2d) 821 (1946).

§ 7-17. Appeals dismissed.—Suits and appeals pending in the Supreme Court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it. (1848, c. 28; R. C., c. 33, s. 20; Code, s. 967; Rev., s. 1543; C. S., s. 1418; Supm. Ct. Rules 15, et seq.)

Failure to Docket Transcript.—An appeal will be dismissed upon a failure of the appellant to docket the transcript as required. *Cox v. Kinston, etc.*, R. R., 177 N. C. 227, 98 S. E. 704 (1919).

When Deemed Docketed.—An appeal is deemed docketed when the transcript is received by the clerk of the court. *Bradford v. Reed*, 124 N. C. 345, 32 S. E. 726 (1899).

Failure to Print Record.—The appeal will be dismissed where there is a failure to print record and brief as required. *Bradshaw v. Stansberry*, 164 N. C. 356, 79 S. E. 302 (1913).

Filing of Bond Gives Notice.—An appeal will not be dismissed upon the ground that no notice of appeal was given, where the record shows that an appeal bond was filed and approved by the court. The fil-

ing of the bond and its approval in open court is notice to the appellee. *Capehart v. Biggs & Co.*, 90 N. C. 373 (1884).

Compliance with Statute Essential.—Compliance with the statutory regulation as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that the negligence is negligence of counsel and not negligence of the party. *Cozart v. Assurance Co.*, 142 N. C. 522, 55 S. E. 411 (1906).

The rules of court are not merely directory, and a failure of the appellant to prosecute his appeal in accordance therewith is sufficient ground for dismissal. *Wiseman v. Comm.*, 104 N. C. 330, 10 S. E. 481 (1889); *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350 (1906).

Where the appellant has failed to prosecute his appeal as required by the rule of the court, the right of the appellee to dismiss the appeal must be exercised before the appellant has complied with the particular rule in question, and if appellee's motion is made thereafter his right to dismiss at that term is barred by his own laches. *McLean v. McDonald*, 175 N. C. 418, 95 S. E. 769 (1918).

Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. *Cross v. Williams*, 91 N. C. 496 (1884), wherein the court said: "The appellant has no right to take an appeal and bring it up, or abandon it at his will and pleasure; he must bring it up in the established course of procedure."

Laches.—Where a case was remanded from the Supreme Court to the end that the appellant might have a lost record supplied by proper proceedings in the court

below, which has not been done, and the record is as defective as when the order of remand was made, though three or four terms of the superior court in that county have transpired and no excuse is rendered for the laches, the case will be dismissed on motion of appellee. *Cox v. Jones*, 113 N. C. 276, 18 S. E. 199 (1893).

Motion to dismiss appeal must be made in writing. *Brafford v. Reed*, 124 N. C. 345, 32 S. E. 726 (1899).

Notice.—No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed. *Jones v. Asheville*, 114 N. C. 621, 19 S. E. 631 (1894).

Reinstatement.—Motion to reinstate, upon notice, may be heard not later than the next term. *Wiseman v. Comm.*, 104 N. C. 330, 10 S. E. 481 (1889).

Same—Failure to Print.—A motion to reinstate an appeal dismissed for failure to print must be made at the same term, and will only then be allowed for good cause shown. *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534 (1893).

Same—Failure to Docket.—A motion to reinstate an appeal dismissed for failure to docket the record at the first term of the court after the trial below is fatally defective where it does not show that the delay was without laches on the part of the appellant. *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534 (1893).

Insufficiency of Bond.—A motion to dismiss an appeal for insufficiency of bond will not be entertained, unless after written notice, as required by this section. *McGee v. Fox*, 107 N. C. 766, 12 S. E. 369 (1890); *Jones v. Asheville*, 114 N. C. 621, 19 S. E. 631 (1894).

Time.—Motion to dismiss because appellant has failed to perfect his appeal must be made at or before hearing. *Hutchinson v. Rumfelt*, 82 N. C. 426 (1880).

§ 7-18. Petition to rehear; execution restrained.—A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the Chief Justice, or any one of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined. (R. C., c. 33, s. 18; Code, s. 966; Rev., s. 1546; C. S., s. 1419; Supm. Ct. Rules 52, 53, 54.)

Cross Reference.—See § 7-16 and note.

In General.—Petitions to rehear are confined to alleged errors of law or newly discovered evidence. *Barcroft v. Roberts*, 92 N. C. 250 (1885).

Not Absolute Right.—This section cannot be allowed to give the losing party an

absolute right to a rehearing, and to have his petition considered by the whole court contrary to its rule governing the practice in such cases. *Herndon v. Fire Ins. Co.*, 111 N. C. 384, 16 S. E. 465 (1892).

Mistake or Error of Fact.—The Supreme Court will not rehear upon the ground of

mistake or error of fact. *Weathersbee v. Farrar*, 98 N. C. 265, 3 S. E. 482 (1887).

Mistake and Excusable Neglect.—A party against whom a judgment has been entered by mistake, excusable neglect or surprise may make application for petition to rehear. *Farrar v. Staton*, 101 N. C. 78, 7 S. E. 753 (1888).

Compliance with Section Essential.—Petitions to rehear must be filed according to the requirements of this section. *Strickland v. Draughan*, 91 N. C. 103 (1884).

Former Decision Must Be Erroneous.—When questions of law have been considered and decided the court will not re-examine the question and reverse its former decision, unless it clearly appears that it is erroneous. *School Directors v. City*, 137 N. C. 503, 50 S. E. 279 (1905).

Criminal Actions.—Petitions to rehear are not allowable in criminal actions. *State v. Council*, 129 N. C. 511, 39 S. E. 814 (1901).

Matters in Transcript Considered.—On petition to rehear a case formerly decided, the Supreme Court will not consider matters not contained in the transcript of the record. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839 (1898).

A petition to rehear must be upon the record as it was at the former hearing. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839 (1898).

Presumption.—Rehearings of decision of cases in the Supreme Court are granted only in exceptional cases and, when granted, every presumption is in favor of the judgment already rendered. *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312 (1898).

Court Will Correct Errors.—When a re-

hearing has been ordered and a manifest error is made to appear, the court will correct it. *Hodgin v. Peoples Bank*, 125 N. C. 503, 34 S. E. 709 (1899).

Burden of Proof.—The burden of showing error is on the petitioner. *Webb v. Hicks*, 125 N. C. 201, 34 S. E. 395 (1899).

Notice.—A purchaser of land which is the subject of litigation is conclusively fixed with notice of the fact that petition for rehearing could be filed at any time until after the expiration of the first twenty days of the next term of the Supreme Court. *Bird v. Gilliam*, 125 N. C. 76, 34 S. E. 196 (1899).

Computation of Time.—In computing the time under the provision of this section allowing a petition to rehear to be filed "within twenty days after the commencement of the succeeding term," the first day thereof must be excluded. The last day must also be excluded when it falls on Sunday. *Barcroft v. Roberts*, 92 N. C. 250 (1885), approved in *Cook v. Moore*, 95 N. C. 4 (1886).

After Case Certified.—After a decision of the Supreme Court has been certified down, the court is without jurisdiction to entertain a motion to recall the mandate and judgment rendered and reconsider it, the only method for such being upon petition to rehear filed according to the rules. *Davis v. Southern R. R.*, 176 N. C. 186, 96 S. E. 945 (1918).

Second Rehearing.—A second rehearing is permissible only when the court has reversed or materially changed the original opinion that was sought to be reheard. *Nelson v. Hunter*, 145 N. C. 334, 59 S. E. 116 (1907).

§ 7-19. Records to be made.—The court may order the clerk to record such parts of the record of cases as it may deem necessary. (Code, s. 959; Rev., s. 1550; C. S., s. 1420.)

§ 7-20. Power to make rules of court.—The justices of the Supreme Court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for such court, to be entered on the records thereof in each county. (1818, c. 963, P. R.; R. C., c. 33, s. 13; Code, s. 961; Rev., s. 1541; C. S., s. 1421.)

Generally.—“In North Carolina, the power to prescribe rules for trial courts (superior courts and inferior courts) is vested in the legislature by the Constitution, but the legislature has committed it to the Supreme Court. This enables the Supreme Court to make rules for trial courts subject, in North Carolina, to legislative modification.” 5 N. C. Law Rev. 275.

The General Assembly is without power to prescribe rules of practice or procedure for the Supreme Court. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928). See note under N. C. Const., Art. IV, § 12.

Rules for Subordinate Courts.—The Supreme Court has, by this section, the power to prescribe rules of practice for the subordinate courts. *Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744 (1887).

Rules Mandatory.—The rules of practice made under the power given by this section are not merely directory, but are mandatory and must be observed. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488 (1889).

In this State the rules of court are the

sole code of practice for the Supreme Court and are to be strictly observed. *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353 (1903).

Cited in *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74 (1936).

§ 7-21. Supreme Court to prescribe rules; rules to conform to law.—The Supreme Court is hereby vested with the power to prescribe from time to time the modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the Supreme Court, and in the trial of actions in the superior court, and before referees: Provided, no rule or regulation so adopted shall be in conflict with any of the provisions of this Code. Such rules as may be adopted by the Supreme Court shall be printed and distributed by the Secretary of State as are the reports of the Supreme Court. (Ex. Sess. 1921, c. 92, s. 1, subsec. 20; C. S., s. 1421(a).)

ARTICLE 3.

Officers of Court.

§ 7-22. The court may appoint acting Attorney General.—If the Attorney General should fail at any term of the Supreme Court to attend to the business which by law is assigned him, the court may appoint some counsel learned in the law to discharge his duties during the term. (1846, c. 29; R. C., c. 33, s. 22; Code, s. 969; Rev., s. 1551; C. S., s. 1422.)

Editor's Note.—See article entitled, *The State's Legal Business*, 16 N. C. Law Rev. 119.

§ 7-23. Reporter.—The Supreme Court may employ a reporter of its decisions. (Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 429; Rev., s. 1552; C. S., s. 1423.)

§ 7-24. Supreme Court reporter; salary; offices.—The Governor and Council of State shall fix the salary of the Supreme Court reporter at not to exceed three thousand dollars a year, and shall furnish the reporter with suitable offices at a cost not to exceed five hundred dollars a year, which shall be paid direct to the lessor upon the warrant of the State Auditor drawn upon the State Treasurer. The reporter may employ a stenographer and clerk, at a salary to be fixed by the Governor and Council of State, payable monthly to the stenographer and clerk by voucher drawn by the State Auditor on the State Treasurer. (Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429; Rev., s. 2771; 1911, c. 107; 1913, c. 59; 1917, c. 272; 1919, c. 276; C. S., ss. 3861, 3889; 1921, c. 143; Ex. Sess. 1921, c. 29.)

§ 7-25. Clerk.—The clerk of the Supreme Court shall be appointed by the court, and shall hold his office for eight years. (Const., art. 4, s. 15; Rev., s. 1553; C. S., s. 1424.)

§ 7-26. Clerk of Supreme Court; salary; fees.—The clerk of the Supreme Court shall receive an annual salary of three hundred dollars, to be paid semiannually, on a certificate of the justices; and, in addition thereto, the following fees, namely: For recording the papers and proceedings in the causes decided in the Supreme Court, which are required by law to be recorded, such compensation as may be estimated by the justices of the court at each term, not to exceed thirty cents for each page recorded, to be paid by the Treasurer on the certificate of the justices; for entering an appeal, one dollar; a continuance, thirty cents; a scire facias, eighty cents; a certiorari, eighty cents; a determination, two dollars; a certificate, sixty cents; a fieri facias, or other execution, fifty cents; a

seal, twenty-five cents; a transcript, or copy of a record, twenty cents for each copy-sheet; a rule given for service, twenty-five cents; a rule not for service, fifteen cents; a subpoena, writ, or other process, one dollar; a commission, fifty cents; drawing a decree or judgment, by the copy-sheet, forty cents; a search, ten cents; affixing the seal to any writing requiring it, twenty-five cents; and an affidavit, twenty-five cents. (R. C., c. 102, ss. 25, 26; 1870-1, c. 139, s. 7; Code, s. 3738; Rev., s. 2769; C. S., s. 3886.)

Cross Reference.—As to payment of fees, see § 138-2.

When Judge Allows Appeal without Bond.—The clerk of the Supreme Court is not bound to render his services gratuitously to a party whom the judge of the

court below has allowed to appeal without giving the bond required by law. *Martin v. Chasteen*, 75 N. C. 96 (1876), approving *Superior Court Office v. Lockman*, 12 N. C. 146 (1827), and *Biggerstaff v. Cox*, 46 N. C. 534 (1854).

§ 7-27. **Clerk's bond and oath of office.**—Before undertaking his duties, the clerk of the Supreme Court shall enter into bond with sufficient surety payable to the State of North Carolina, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of his duties and for the safekeeping of all records committed to his custody, which bond shall be lodged with the Secretary of State; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh. (1799, c. 520, s. 2, P. R.; 1812, c. 829, s. 2, P. R.; 1818, c. 963, s. 5, P. R.; 1846, c. 28, s. 3; R. C., c. 33, s. 9; Code, s. 958; Rev., s. 290; C. S., s. 1425.)

Cross References.—As to action on official bonds, see § 109-34 and note. As to forms of oaths, see §§ 11-6, 11-7, 11-11.

As to constitutional requirement and form, see Const., Art. VI, § 7.

§ 7-28. **Clerk to report money on hand.**—The clerk of the Supreme Court shall, at the beginning of each fall term, produce to the court a statement on oath of all moneys remaining in his hands which have been paid into his office three years or more previous thereto, whether received directly from parties or from his predecessor in office, and is not detained in his hands by special order of the court, specifying therein the name of the person to whom the same is payable, and his address, if known; a copy of which report shall be transmitted to the State Treasurer and to the Auditor. (1823, c. 1186, P. R.; 1831, c. 3, P. R.; R. C., c. 73; Code, s. 1864; Rev., s. 1554; C. S., s. 1426.)

§ 7-29. **Marshal; librarian.**—The Supreme Court may appoint a marshal of the Supreme Court, removable at will, who shall have the criminal and civil powers of a sheriff and shall attend upon the court during its sessions. The Supreme Court may consolidate the duties of the marshal with those of the librarian; when so consolidated the compensation of the marshal-librarian shall be fixed by the Supreme Court, with the approval of the Governor. (1873-4, c. 34; 1881, c. 306; Code, s. 950; Rev., s. 1555; C. S., s. 1427; 1939, c. 4.)

§ 7-29.1. **Administrative assistant to Chief Justice.**—1. The Chief Justice of the Supreme Court of North Carolina is hereby authorized and empowered to appoint some competent person to act as his administrative assistant in performing the duties imposed upon the Chief Justice by § 11, Article IV of the Constitution of North Carolina. Such person so appointed shall hold said position at the will of the Chief Justice.

2. The person named by the Chief Justice as his administrative assistant, as provided in the preceding section, shall be paid such salary as may be fixed by the Chief Justice.

3. The Chief Justice of the Supreme Court of North Carolina shall have the authority to prescribe the functions and duties of the administrative assistant appointed by him as may be deemed by the Chief Justice to be necessary to enable him to properly carry out the administrative duties imposed upon him by §

11, Article IV of the Constitution of North Carolina. The administrative assistant shall be furnished with such secretarial and stenographic personnel as shall be recommended by the Chief Justice.

4. The administrative assistant may also perform the duties of executive secretary of the judicial council or the duties of the Supreme Court reporter.

5. The funds necessary for the payment of expenses operating under the terms of this section shall be paid from the Contingency and Emergency Fund until the first day of July, 1951, and thereafter such expenses shall be paid on approved budgets as applicable to other maintenance expenditures. (1951, c. 243.)

ARTICLE 4.

Supreme Court Library.

§ 7-30. **Location.**—The Supreme Court library shall occupy the fifth floor of the Department of Justice building. (1885, c. 121, s. 7; Rev., s. 5083; 1913, c. 99, s. 1; C. S., s. 6588.)

§ 7-31. **Trustees; powers; duties.**—The justices of the Supreme Court shall be, ex officio, the trustees of the Supreme Court library and all moneys appropriated for its benefit shall be paid out under their direction and supervision. They shall have general charge and control of the library with authority to acquire, lend, exchange, and dispose of books and equipment in the interest of the library, but may, in their discretion, employ a librarian to discharge this function under such regulations and orders as they may prescribe. The trustees may employ an assistant librarian and such other assistants as may be deemed necessary for the efficient functioning of the library. (Code, s. 3606; 1883, c. 100; 1889, c. 482; Rev., s. 5084; C. S., ss. 1428, 6589; 1937, c. 173.)

Cross Reference.—As to Supreme Court rule relating to duties of librarian, see Rule 41, subsection 1.

Editor's Note. — The 1937 amendment authorized the appointment of an assistant librarian.

§ 7-32. **Library hours; night use.**—The library shall be kept open during such hours and under such conditions as the trustees may prescribe; attorneys of North Carolina, and such other persons as the trustees may deem proper, shall be admitted to the library at night upon application and compliance with reasonable rules adopted by the trustees. (1889, c. 482; Rev., s. 5085; C. S., s. 6590.)

Cross Reference.—As to Supreme Court rule relating to use of books in the library, see Rule 41, subsection 2.

§ 7-33. **Appropriation.**—In addition to the funds regularly appropriated for the library, the clerk of the Supreme Court shall, upon order of the librarian under the general supervision and control of the trustees, expend for the maintenance and equipment of the library the funds, in excess of the actual expenses of each examination, paid in by the Board of Law Examiners from the fees of applicants. (Code, s. 3613; Rev., s. 5086; C. S., s. 6591; 1925, c. 275, s. 6.)

Editor's Note. — The 1925 amendment omitted a provision for the expenditure of \$200 for the binding of books.

ARTICLE 5.

Supreme Court Reports.

§ 7-34. **Supreme Court reports; contract for printing.**—The Supreme Court is authorized to contract from time to time for the printing of its reports; to select a printer for the same and to prescribe such terms of contract as will insure, under the supervision of the court, the prompt issue of the reports as soon

as practicable after a sufficient number of opinions are filed. Such contract shall be made after consultation with the Division of Purchase and Contract after a comparison of prices for similar work in other states to such an extent as may be practicable. (1905, c. 400; Rev., s. 5093; C. S., s. 7296; 1929, c. 39, s. 1; 1931, c. 261, s. 3; 1931, c. 312, ss. 14, 15.)

Cross Reference.—See § 143-49.

In General.—Upon the Supreme Court devolves the duty only of selecting the printer and directing the style and general execution of the work, the price of which

is restricted to that allowed and fixed by the committee. In re Printing of the Supreme Court Reports, 153 N. C. 649, 70 S. E. 620 (1910).

§ 7-35. Supreme Court reports; number printed.—Of the Supreme Court reports there shall be printed and bound in full sheep or buckram as many copies, not less than seven hundred and fifty, as in the opinion of the Attorney General and Secretary of State may be sufficient to supply the demand. All such copies shall be delivered to the Secretary of State. Advance sheets of the Supreme Court reports are hereby authorized to be printed, and to be sold, under the rules of the Supreme Court. (Code, s. 3632; 1893, c. 146, s. 2; 1897, c. 135; 1901, c. 401, s. 2; Rev., s. 5097; 1919, c. 314, s. 4; C. S., s. 7297; 1923, c. 25.)

Editor's Note.—The 1923 amendment added the last sentence.

ARTICLE 6.

Salaries of Supreme Court Employees.

§ 7-36. Governor and council to fix certain salaries.—The Governor and Council of State shall constitute a board to adjust and fix the compensation to be paid to the employees of the Supreme Court. (C. S., s. 3861; 1921, c. 143, ss. 1, 4; Ex. Sess. 1921, c. 29; Ex. Sess. 1924, c. 124.)

Editor's Note.—Under the 1924 amendment this section was applicable to employees of the State Library.

§ 7-37. Limit of salary; certificate and payment.—The compensation fixed under § 7-36 shall not exceed three thousand dollars per annum, except as may be elsewhere provided by law, for any individual employee, and shall be certified by the Governor to the State Auditor, and paid as provided by law for the payment of other salaries. (1921, c. 143, s. 2; C. S., s. 3861(a).)

§ 7-38. Proceedings and reports.—The proceedings of the board shall be kept by the State Auditor, and reported to each regular session of the General Assembly. (1921, c. 143, s. 3; C. S., s. 3861(b).)

§ 7-39. Employment of additional assistants; compensation.—The Governor and Council of State are authorized and empowered to employ any additional clerical or stenographic help, for the Supreme Court, upon written request from the Chief Justice, and when they are satisfied that such additional help is needed temporarily, to do the departmental work efficiently, and to fix the salary of such additional help at not to exceed eighteen hundred dollars for any one person. (Ex. Sess. 1920, c. 95, s. 2; C. S., s. 3861(d).)

SUBCHAPTER II. SUPERIOR COURTS.

ARTICLE 7.

Organization.

§ 7-40. Number of judges and solicitors.—The State shall be divided into twenty-one superior court judicial districts, for each of which a judge shall

be chosen in the manner now prescribed by law. The State shall also be divided into twenty-one solicitorial districts as set out in § 7-68, for each of which a solicitor shall be chosen in the manner now prescribed by law. (Const., art. 4, s. 10; 1913, cc. 9, 63; C. S., s. 1429; 1943, c. 134, s. 3.)

Editor's Note. — The 1943 amendment substituted "twenty-one" for "twenty" in the first sentence, and added the second sentence.

For act creating twenty-first judicial district and providing for judge and solicitor thereof, see Public Laws 1937, c. 413, ss.

5, 6.

Judge Appointed Prior to Creation of District.—Appointment of a judge of the superior court prior to the date when the act creating the judicial district takes effect is invalid. *State v. Shuford*, 128 N. C. 588, 38 S. E. 808 (1901).

§ 7-41. Election and term of office of judges.—The judges of the superior courts shall be elected in like manner as is provided for justices of the Supreme Court, and shall hold their offices for eight years. (Const., art. 4, s. 21; C. S., s. 1430.)

Cross Reference.—For manner of electing Supreme Court justices, see § 7-2.

§ 7-42. Salaries of superior court judges.—The salary of each of the judges of the superior court shall be ten thousand dollars (\$10,000.00) per annum, and each judge shall be allowed the sum of two thousand five hundred dollars (\$2,500.00) in lieu of necessary traveling expenses and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1.)

Cross Reference. — As to compensation of judge in district having fewer than 20 regular weeks of term, see § 7-79.

Editor's Note.—The 1927 amendment increased the salary from \$5,000 to \$6,500.

The 1949 amendment increased the salary and expense allowance. Section 2 of the amendatory act made the compensation provided effective as of Jan. 1, 1949.

Additional Compensation Part of Salary.

— The additional compensation of one hundred dollars given to a superior court judge by the former wording of this section for services in holding a special term was a part of his salary. *Buxton v. Commissioners*, 82 N. C. 91 (1880).

As to taxing salaries of judges, see Const., Art. IV, § 18.

§ 7-43. Election and term of office of solicitors.—A solicitor shall be elected for each solicitorial district by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State in all criminal actions in the superior courts, and advise the officers of justice in his district. (Const., art. 4, s. 23; C. S., s. 1431; 1943, c. 134, s. 4.)

Local Modification. — Forsyth: 1927, c. 129.

Cross References.—As to when term begins, see § 163-114. As to duty of solicitors to bring action for failure of trustee of charitable trust to file account, see § 36-20. As to duty of solicitor to appear in contempt actions, see § 5-3. As to duty to prosecute in certain violations of law by county officers, see § 153-139. As to duty to investigate in case of lynching, see § 15-98. As to duty to inform grand juries in

adjoining counties in case of lynching, see § 15-128. As to duty to aid in prosecuting for violation of laws governing monopolies and trusts, see § 75-13.

Editor's Note. — The 1943 amendment, which substituted "solicitorial" for "judicial" in line two, further provided: Wherever reference to the solicitor of a "judicial district" appears in any statute the same shall be deemed to refer to the solicitor of a "solicitorial district."

§ 7-43.1. Assistant solicitor appointed by county board of commissioners.—The board of commissioners of any county in the State where no inferior court has been established as provided by chapter 7 of the General Statutes, as amended, is hereby authorized and empowered, in its discretion, to ap-

point a competent attorney of the county to assist the solicitor of the solicitorial district, in which said county is included, in the prosecution of the criminal docket of the superior court of said county: Provided, that no one shall be appointed assistant solicitor under this section unless and until he has first been recommended and nominated for such position or office by the solicitor of the solicitorial district in which said county is included. The solicitor of the solicitorial district in which said county is located shall designate and define the duties of the assistant solicitor appointed under this section and is authorized and empowered to remove the said assistant solicitor from office at any time without hearing: Provided, written notice of said removal is delivered to said assistant solicitor and the chairman of the board of commissioners of the county more than thirty (30) days prior to the effective date of said removal. The first term of the office of the assistant solicitor appointed under the authority of this section shall begin on such date as the board of county commissioners of the county concerned shall designate and shall end on the last day of the calendar year in which said appointment is made, and thereafter, the term of office of said assistant solicitor shall begin on January 1st of each year and shall end on December 31st of the same calendar year. At the end of any term of the position or office of the assistant solicitor, the board of county commissioners of the county concerned may, in its discretion, leave the office of assistant solicitor vacant for the ensuing term, or any portion thereof; but this provision shall not prevent the board of commissioners from appointing an assistant solicitor upon recommendation and nomination of the solicitor at any time when the office is vacant. The salary of the assistant solicitor shall be fixed from term to term by the board of county commissioners of the county in which such appointment is made and shall be in such an amount as the board of county commissioners of the county shall deem proper, just and reasonable, in its discretion, taking into consideration the amount, type and kind of services to be performed, and said salary shall be paid in equal monthly installments from the general fund of the county. The solicitor of the solicitorial district in which said county is located, and for which said assistant solicitor is appointed, shall at all times have the power and authority to define and fix the duties of said assistant solicitor. (1951, c. 1116, s. 1.)

Editor's Note. — Section 3 of the act inserting the above section provided: "This act shall not be construed as repealing any public, public-local or special act heretofore

enacted or which may be enacted at the 1951 session of the General Assembly providing for an assistant solicitor as set forth in such public, public-local or special act."

§ 7-43.2. Designating prosecuting attorney of inferior court to assist solicitor.—In any county in this State where there has been established or may be established, an inferior court under the provisions of chapter 7 of the General Statutes, as amended, and such inferior court has, or shall have, criminal jurisdiction over the entire county in which said court is established, or may be established, the board of county commissioners of such county is hereby authorized and empowered, in its discretion, to designate the prosecuting attorney for such inferior court to assist the solicitor of the solicitorial district, in which said county is included or located, in the prosecution of the criminal docket of the superior court of said county: Provided, that the said prosecuting attorney shall not be so designated unless and until the solicitor of the solicitorial district has advised with the board of county commissioners of said county as to the necessity for such action and approves such appointment. The solicitor of the solicitorial district in which such county is included or located shall define and fix the duties of said prosecuting attorney in assisting the solicitor of said solicitorial district, and the duties of the prosecuting attorney of the inferior court, after such appointment and designation, in assisting the solicitor of the solicitorial district shall be additional duties as prosecuting attorney of the inferior court, and the performance of his duties in assisting the solicitor of the solicitorial district shall not be construed as creating or establishing a new or additional office. The board

of county commissioners of the county in which the prosecuting attorney of such inferior court is appointed to assist the solicitor of the solicitorial district may, in its discretion, provide for additional salary that may be paid to said prosecuting attorney of such inferior court by reason of his additional duties in assisting the solicitor of the solicitorial district. Such additional salary, if so provided, shall be fixed in such an amount as, in the discretion of the board of commissioners, shall be considered proper, reasonable and just, taking into consideration the amount, type and kind of services to be performed by the prosecuting attorney in giving such assistance and shall be paid in equal monthly installments from the general fund of the county concerned. The first period of time in which the prosecuting attorney shall begin the performance of his duties in assisting the solicitor of the solicitorial district shall begin on such date as the board of commissioners of the county concerned shall designate and shall end on the last day of the calendar year in which such beginning period is fixed or instituted. Thereafter, the period of time in which such assistance shall be performed shall begin on the first day of each calendar year and shall end on the last day of such calendar year. At the end of any period of time in which such assistance to the solicitor of the solicitorial district is performed by the prosecuting attorney, as herein provided, the board of commissioners of the county concerned may, in its discretion, discontinue such assistance on the part of the prosecuting attorney for the ensuing period of time, or any portion thereof; but this provision shall not prevent the board of county commissioners of such county from again designating the prosecuting attorney of such inferior court to perform the duties herein authorized upon the approval of the solicitor of the solicitorial district at any time when such assistance has theretofore been discontinued. In lieu of designating the prosecuting attorney of such inferior court, as herein provided, the board of county commissioners of such county may appoint a competent attorney of the county to perform such duties as provided by § 7-43.1. (1951, c. 1116, s. 2.)

Cross Reference.—See note under § 7-43.1.

§ 7-43.3. Assistant solicitor to represent State during absence or disability of regular solicitor.—1. When any solicitor of the superior court who has been elected to that office or appointed by the Governor to fill a vacancy occurring therein shall, because of illness or injury or necessary absence, or by reason of any other temporary disability be unable or unavailable to discharge the duties of his office, such regular solicitor, with approval of the resident or presiding judge, is hereby authorized and empowered to appoint as assistant to the solicitor some competent and otherwise well qualified member of the bar in any one or more of the counties in such solicitor's solicitorial district, the person or persons so appointed being hereby authorized and empowered as such assistant to discharge for and on behalf of the solicitor all the duties of the office of solicitor, in the respective counties from which they are appointed, during the absence or disability of the solicitor, or until such time as their appointment terminates.

Such appointment of assistants to solicitors in the respective counties of the several solicitorial districts shall be for such periods of time as the appointing solicitor may designate, but all such appointments shall be subject to termination at any time, by the appointing solicitor.

2. Within their respective counties, the assistants to solicitors appointed and serving pursuant to this section shall, until such time as their appointments expire or are terminated, or until the solicitor shall resume his duties, be vested with all the powers and authority given by statute or otherwise to the office of such solicitor, and shall be charged with all the duties and responsibilities relating thereto, as fully in all respects, and at all times, in term or otherwise, as the same are vested in or devolve upon the solicitor.

All official acts of any such assistant to the solicitor appointed and serving pursuant to this section are hereby given the same force and effect as if they were the official acts of the solicitor.

3. All assistants to solicitors appointed pursuant to this section shall take an oath of office similar to that required of regular solicitors.

4. Any solicitor appointing or terminating the appointment of any assistant to the solicitor pursuant to the provisions of this section shall cause a record of such appointment or termination, together with the dates thereof and a statement of reasons therefor, to be entered upon the court records of the clerk of the superior court of the county in which such appointment is made.

5. In the event any solicitor authorized to make or terminate the appointment of assistants to solicitors under the provisions of this section should become incapacitated to such an extent as to render him physically or mentally incapable of exercising such authority, then the resident judge of the judicial district or the presiding judge in such solicitorial district is hereby authorized and empowered to exercise all the rights and powers of appointment and termination of appointment herein granted such solicitors, in the same manner and to the same extent as provided in this section in respect to such regular solicitors.

6. The compensation, if any, paid to such assistant to the solicitor shall be paid by the regular solicitor.

7. This section shall not modify or repeal any local act providing for the appointment of an assistant solicitor. (1951, c. 180.)

§ 7-44. Solicitors; general compensation.—The several solicitors of the solicitorial districts of the State of North Carolina shall each receive, as full compensation for services as solicitor, the sum of sixty-five hundred dollars (\$6500.00) to be paid in equal monthly installments out of the State treasury upon warrants duly drawn thereon, which said salaries shall be in lieu of fees or other compensation, except the expenses allowed in § 7-45. (1879, c. 240, s. 12; Code, s. 3736; Rev., s. 2767; C. S., s. 3890; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; 1949, c. 189, s. 1.)

Editor's Note.—The 1935 amendment increased the salary from \$3,900 to \$4,500.

The 1943 amendment substituted "solicitorial" for "judicial" in line two.

The 1949 amendment rewrote this section and increased the solicitor's salary from \$4,500.00 to \$6,500.00.

In *Moore v. Roberts*, 87 N. C. 11 (1882),

it was held that the solicitor of the criminal court of a county has no claim upon the State for such compensation as is allowed the district solicitors under this section, where the act establishing said court puts the burden of sustaining the same upon the county.

§ 7-45. Appropriation for expenses of solicitor.—Each solicitor shall receive, in addition to the salary named in § 7-44, the sum of fifteen hundred dollars (\$1500.00) per annum, which will cover all of his expenses while engaged in duties connected with his office. Said sum shall be paid in equal monthly installments out of the State treasury upon warrant duly drawn thereon. (1923, c. 157, s. 2; C. S., s. 3890(a); 1933, c. 78, s. 2; 1937, c. 348; 1949, c. 189, s. 2.)

Editor's Note. — This section, first inserted by the act of 1923 and providing \$750 for expenses, was repealed in 1933. The present section was codified from the

1937 act, and rewritten by the 1949 amendment which increased the amount allowed for expenses from \$500.00 to \$1,500.00 as of Jan. 1, 1949.

§ 7-46. Judicial districts; resident judge; rotation; special superior court judges; assignment of superior court judges by Chief Justice.—Each judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years. Special or emergency superior court judges

not assigned to any judicial district may be designated from time to time by the Chief Justice of the Supreme Court to hold court in any district or districts within the State. The Chief Justice, when in his opinion the public interest so requires, may assign any superior court judge to hold one or more terms of superior court in any district. (Const., art. 4, s. 11; C. S., s. 1432; 1951, c. 491, s. 2.)

Cross References.—As to method of rotation, see § 7-74. See also N. C. Const., Art. IV, § 11, and note.

Editor's Note.—The 1951 amendment rewrote this section and substituted "Chief Justice of the Supreme Court" for "Governor". Section 1 of the amendatory act provided that this chapter of the General Statutes be hereby amended by striking out "Governor" and inserting in lieu thereof the words "Chief Justice of the Supreme Court" in certain listed sections and in all other places where the same may be necessary in order to confer upon the Chief Jus-

tice all the powers and duties now exercised or performed by the Governor with respect to the assignment of judges and the calling of terms of court, but not including any power of appointment of any superior court judge.

De Facto Judges.—A judge of a superior court who presides in another district by appointment of the Governor, is a de facto judge, and his acts in that capacity are valid. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 100 (1890); *State v. Turner*, 119 N. C. 841, 25 S. E. 810 (1896).

§ 7-47. Oath of office.—Every judge before he shall act as such shall, in open court, or before the Governor, or before one of the judges of the Supreme or superior courts, or before some justice of the peace, or before any clerk of the superior court, take the oath appointed for public officers, and also an oath of office. The officer or court before whom the judge shall qualify shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return the oaths to the Secretary of State, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one half to the use of the State and the other half to the person who shall sue for the same. (1777, c. 115, P. R.; 1806, c. 694, s. 13, P. R.; 1848, c. 45; R. C., c. 31, ss. 18, 19; Code, s. 924; Rev., s. 1497; C. S., s. 1433; 1951, c. 28, s. 1½.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11. As to penalty for failure, see § 128-5. As to constitutional requirement and form, see Const., Art. VI, § 7.

Editor's Note.—The 1951 amendment, which inserted in the first sentence the words "or before any clerk of the superior court", does not apply to litigation instituted prior to July 1, 1951.

§ 7-48. Vacancies filled.—All vacancies occurring by death, resignation or otherwise in the offices of justice of the Supreme or judge of the superior court of the State shall be filled for the unexpired term at the next general election for members of the General Assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the Governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission. (Const., art. 4, s. 25; 1899, c. 613; Rev., s. 1498; C. S., s. 1434.)

Cross Reference.—As to filling vacancies prior to next election, see N. C. Const., Art. IV, § 25.

§ 7-49. When judge may discharge solicitor.—When any State solicitor, authorized by election or appointment to act as prosecuting attorney for or in behalf of the State of North Carolina, in any of the courts of said State, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor whose duty it is to represent the State at such court is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some com-

petent attorney to act as State solicitor for the term. The appointee shall be allowed all the fees and compensation belonging to the solicitor for such term. (1901, c. 717; Rev., s. 1499; C. S., s. 1435.)

§ 7-50. Emergency judges; duties; compensation.—The persons embraced within the provisions of § 7-51 are hereby constituted emergency judges of the superior court under article four (4), section eleven (11), of the Constitution of this State, and are authorized to hold the superior courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and to hold special terms when commissioned so to do by the Chief Justice of the Supreme Court, and as compensation for holding such special terms shall receive their actual expenses and in addition thereto fifty dollars per week, to be paid by the county in which such special term is held.

In case of emergency arising as provided in said section, the Chief Justice of the Supreme Court shall designate the person to act as emergency judge who shall receive his actual expenses only incurred while so acting, to be paid by the Treasurer upon warrant of the Auditor, upon certificate of the judge: Provided, that the county asking the Chief Justice of the Supreme Court for an emergency judge shall have the privilege of requesting the assignment of a particular judge. Such emergency judges shall be subject to all the regulations respecting superior court judges except as otherwise provided in §§ 7-50, 7-52, and 7-53.

Where any justice of the Supreme Court or any judge of the superior court (regular or special) heretofore has retired, under the provisions of any statute or law authorizing such retirement at the time, and such act of retirement has been recognized and approved by the Governor and the assistant to the Director of the Budget, such judge shall be entitled to receive the retirement pay provided by G. S. 7-51, notwithstanding the circumstance that such retired judge, by reason of the nature and cause for his retirement, or by reason of his physical condition, cannot be assigned to hold terms of court or perform other judicial functions; and the State Auditor is authorized to issue vouchers to such retired judge for the retirement payment provided in G. S. 7-51. (1921, c. 125, ss. 2, 3; Ex. Sess. 1921, c. 20, s. 3; C. S., s. 1435(a); 1941, c. 52, s. 1; 1951, c. 491, s. 1; 1951, c. 1004, s. 1.)

Cross References.—As to duty of Governor to assign judges when regular judges not available, see § 7-71. As to Governor ordering special terms, see § 7-78.

Editor's Note. — The 1941 amendment struck out the words "special or" formerly appearing after the word "constituted" near the beginning of the first paragraph.

The first 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor" in the first two paragraphs, and the second 1951 amendment added the last paragraph.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 473.

This section was discussed in 3 N. C.

Law Rev. 131.

The recitation of an erroneous date in the concluding part of a commission to an emergency judge to hold a term of court will not invalidate the commission, when it is manifestly a clerical error without tendency to mislead when the commission is construed in its entirety in the light of the dates for the commencement of the terms of court. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

A special judge who retired under former provisions of § 7-51 for total disability was held not an emergency judge. *Alpine Motors Corp. v. Hagwood*, 233 N. C. 57, 62 S. E. (2d) 518 (1950).

§ 7-51. Salaries of resigned or retired justices of Supreme Court and judges of superior courts.—Every justice of the Supreme Court and regular or special judge of the superior court who has heretofore resigned during his term of office or retired from office at the end of his term, or who shall hereafter resign or retire during his term of office or at expiration of his term, who has attained the age of sixty-five (65) years at the date of his resignation or retirement, and who has served for fifteen (15) years on the Supreme Court or on the superior court, or on the Supreme Court and the superior court com-

bined, or twelve (12) consecutive years on the Supreme Court, or who, while serving on the Supreme Court, has attained the age of eighty (80) years, shall receive for life two thirds ($\frac{2}{3}$) of the annual salary from time to time received by the justices of the Supreme Court or judges of superior courts, respectively, payable monthly; in addition to the retirement pay provided in this section, each emergency judge of the superior court shall be paid by the State fifty dollars (\$50.00) for each week of any regular term of court held by such emergency judge, together with his actual expenses: Provided, that any such justice or judge, who has or shall have served as such for twenty-four years or longer (whether continuously or not) shall be entitled to all of the benefits of this section from and after the date of his resignation or retirement, and shall also be subject to the other provisions of this section. (1921, c. 125, s. 1; Ex. Sess. 1921, c. 20, ss. 1, 2; C. S., s. 3884(a); 1927, cc. 133, 201; 1935, cc. 233, 400; 1937, c. 199; 1939, c. 258; 1943, c. 543; 1951, c. 1004, s. 2.)

Editor's Note. — The 1935 amendment reduced the retirement age from seventy to sixty-five years and added the phrase reading: "or twelve consecutive years on the Supreme Court."

The 1937 amendment inserted a provision as to disability through accident or disease. For present provisions, see § 7-51.1.

The 1939 amendment inserted the words "regular or special" near the beginning of the section and made other changes.

The 1943 amendment substituted "sixty-fifth" for "seventieth" in a former provision of the section.

The 1945 amendment provided for retirement of Supreme Court justices upon

attaining age of 80 years.

The 1949 amendment inserted a provision relating to the compensation of retired judges for holding court.

The 1951 amendment rewrote this section.

See 12 N. C. Law Rev. 367, for note on "Power of Congress to Diminish the Retired Salaries of Federal Judges."

A special judge who retired under former provisions of this section for total disability was held not an emergency judge under the provision of § 7-50 that persons embraced within the provisions of this section are constituted emergency judges. *Alpine Motors Corp. v. Hagwood*, 233 N. C. 57, 62 S. E. (2d) 518 (1950).

§ 7-51.1. Salaries of justices or judges retired because of accident or disease.—Every justice of the Supreme Court and regular or special judge of the superior court who has served eight (8) years or more on either the Supreme Court or superior court, without regard to the age of such justice or judge, and while still in active service thereon, shall have become totally disabled, through accident, physical impairment or disease, to perform efficiently the duties of his office and who resigns by reason of such disability or retires at the end of his term, shall receive for life two thirds ($\frac{2}{3}$) of the annual salary from time to time received by the justices of the Supreme Court or judges of the superior court, respectively, payable monthly, but such judge shall not be required to qualify or serve as an emergency judge. Whenever hereafter such justice of the Supreme Court or regular or special judge of the superior court shall claim to be entitled to be retired on account of total disability, through accident, physical impairment or disease, to perform efficiently the duties of his office, the Governor and Council of State, acting together, shall, after notice and opportunity for hearing is given such justice or judge, by a majority vote of said body, determine and find the facts with respect thereto from the evidence offered, which shall be filed with the Council of the State, and enter upon the minutes of the Council of State such findings. The findings so made shall be conclusive as to such matters and determine the right of the justice or judge to the retirement benefits hereunder. If thereafter such justice or judge regains his mental or physical faculties to such an extent that he can perform the functions and duties of the office of justice or judge in the capacity of limited service, then such justice or judge may perform the duties of emergency judge as provided by G. S. 7-50. The Governor and Council of State, acting together upon their own motion, or upon petition of any such justice or judge asking to be restored to limited service, and after notice and opportunity for hearing is given such justice

or judge, shall, by a majority vote of said body, determine and find the facts with respect thereto from the evidence offered, which shall be filed with the Council of State, and enter upon the minutes of the Council of State such findings. The findings so made shall be conclusive as to such matters and determine the right of the justice or judge to perform limited service as herein provided.

Provided further, that subsequent to the end of the term during which the said judge or justice became disabled, if said judge or justice shall regain his mental or physical faculties in full, then the Governor and Council of State, acting together, upon their own motion, and after a hearing and determination that such judge or justice has fully recovered, shall file such findings with the Council of State, and thereafter, said judge or justice shall no longer be eligible to serve as an emergency judge or to receive the retirement benefits provided in this section. The findings so made shall be conclusive as to the right of said judge or justice to continue to serve as an emergency judge or to receive the retirement benefits referred to herein. (1951, c. 1004, s. 3.)

§ 7-51.2. Retired justices and judges subject to assignment as emergency judges.—All justices of the Supreme Court and judges of the superior court and regular or special judges who are retired hereunder or under any other provision of law previously enacted shall be subject to the assignment as emergency judges by the Chief Justice of the Supreme Court of North Carolina, except justices or judges retired under the provisions of G. S. 7-51.1 who have not been restored to duty for limited service, and when so assigned, shall perform all the duties and shall have all powers which are now or may hereafter be conferred upon emergency judges of the State of North Carolina. (1951, c. 1004, s. 3.)

§ 7-52. Jurisdiction of emergency judges.—Emergency superior court judges are hereby vested with the same power and authority in all matters whatsoever, in the courts in which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later. (Ex. Sess. 1921, c. 94, s. 1; C. S., s. 1435(b); 1925, c. 8; 1941, c. 52, s. 2; 1951, c. 88.)

Cross Reference.—As to duty of Governor to assign judges when regular judges not available, see § 7-71.

Editor's Note. — The 1941 and 1951 amendments rewrote this section.

§ 7-53. Orders returnable to another judge; notice.—If any special or emergency judge has made any matters returnable before him, and subsequent thereto he should be called upon by the Chief Justice of the Supreme Court to hold court elsewhere, said judge shall make an order directing said matter to be heard before some other judge, setting forth in said order the time and place same is to be heard, and send a copy of said order to the attorney or attorneys representing the parties plaintiff and defendant in such matter. (Ex. Sess. 1921, c. 94, s. 2; C. S., s. 1435(c); 1951, c. 491, s. 1.)

Editor's Note. — The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor."

§ 7-54. Governor to make appointment of four special judges.—The Governor of North Carolina may appoint four persons who shall possess the requirements and qualifications of special judges as prescribed by article four, section eleven, of the Constitution, and who shall take the same oath of office and otherwise be subject to the same requirements and disabilities as are or may be prescribed by law for judges of the superior court, save the requirements

of residence in a particular district, to be special judges of the superior court of the State of North Carolina. Two of the said judges shall be appointed from the Western Judicial Division and two from the Eastern Judicial Division, as now established. The Governor shall issue a commission to each of said judges so appointed whose term of office shall begin from his appointment and qualification and end June thirtieth, one thousand nine hundred and fifty-three, and the said commission shall constitute his authority to perform the duties of the office of a special judge of the superior court during the time named herein. (1927, c. 206, s. 1; 1929, c. 137, s. 1; 1931, c. 29, s. 1; 1933, c. 217, s. 1; 1935, c. 97, s. 1; 1937, c. 72, s. 1; 1939, c. 31, s. 1; 1941, c. 51, s. 1; 1943, c. 58, s. 1; 1945, c. 153, s. 1; 1947, c. 24, s. 1; 1949, c. 681, s. 1; 1951, c. 1119, s. 1.)

For a discussion of this statute, see Jerome on Civil Procedure, p. 37.

Editor's Note.—Prior to the 1933 amendment this section was mandatory. It required that the Governor "shall" appoint, etc.

Present §§ 7-54 through 7-61 were codified from Session Laws 1951, c. 1119, which was practically a re-enactment of the former sections without change except as to dates.

For comment on the 1941 and 1943 amendments to this and the following seven sections, see 19 N. C. Law Rev. 473; 21 N. C. Law Rev. 342.

Judicial Notice of Appointment as Special Judge.—The Supreme Court will take

judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of this chapter. *Greene v. Stadium*, 197 N. C. 472, 149 S. E. 685 (1929).

When necessary for the determination of a case on appeal, the Supreme Court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor under the authority of this section. *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719 (1930).

Cited in *Bohannon v. Virginia Trust Co.*, 198 N. C. 702, 153 S. E. 263 (1930).

§ 7-55. Removal of special judges; filling vacancies.—Each special judge so appointed by the Governor shall be subject to removal from office for the same causes and in the same manner as regular judges of the superior court; and vacancies occurring in the offices created by §§ 7-54 to 7-61 shall be filled by the Governor in like manner for the unexpired term thereof. (1927, c. 206, s. 2; 1929, c. 137, s. 2; 1931, c. 29, s. 2; 1933, c. 217, s. 2; 1935, c. 97, s. 2; 1937, c. 72, s. 2; 1939, c. 31, s. 2; 1941, c. 51, s. 2; 1943, c. 58, s. 2; 1945, c. 153, s. 2; 1947, c. 24, s. 2; 1949, c. 681, s. 2; 1951, c. 1119, s. 2.)

§ 7-56. Further appointments.—The Governor is further authorized and empowered, if in his judgment the necessity exists therefor, to appoint at such time as he may determine, not exceeding four additional judges, two of whom shall be residents of the Western Judicial Division and two of whom shall be residents of the Eastern Judicial Division, whose terms of office shall begin from his or their appointment and qualification and end June thirtieth, one thousand nine hundred and fifty-three. All of the provisions of §§ 7-54 to 7-61 applicable to the four special judges authorized to be appointed under § 7-54 shall be applicable to the four special judges authorized to be appointed under this section. (1927, c. 206, s. 3; 1929, c. 137, s. 3; 1931, c. 29, s. 3; 1933, c. 217, s. 3; 1935, c. 97, s. 3; 1937, c. 72, s. 3; 1939, c. 31, s. 3; 1941, c. 51, s. 3; 1943, c. 58, s. 3; 1945, c. 153, s. 3; 1947, c. 24, s. 3; 1949, c. 681, s. 3; 1951, c. 1119, s. 3.)

Editor's Note. — The 1941 amendment authorized the appointment of four additional judges, the appointment of two hav-

ing been previously authorized.

For comment on this amendment, see 19 N. C. Law Rev. 473.

§ 7-57. Extent of authority.—The authority herein conferred upon the Governor, pursuant to article four, section eleven, of the Constitution of North Carolina, to appoint such special judges shall extend to regular as well as special terms of the superior court, with either civil or criminal jurisdiction, or both, as may be designated by the statutes or by the Governor pursuant to law. (1927, c. 206, s. 4; 1929, c. 137, s. 4; 1931, c. 29, s. 4; 1933, c. 217, s. 4; 1935, c.

97, s. 4; 1937, c. 72, s. 4; 1939, c. 31, s. 4; 1941, c. 51, s. 4; 1943, c. 58, s. 4; 1945, c. 153, s. 4; 1947, c. 24, s. 4; 1949, c. 681, s. 4; 1951, c. 1119, s. 4.)

§ 7-58. Same power and authority as regular judges.—To the end that such special judges shall have the fullest power and authority sanctioned by article four, section eleven of the Constitution of North Carolina, such judges are hereby vested, in the courts which they are duly appointed to hold, with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. A special judge duly assigned to hold the court of a particular county shall have during said term of court, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court. (1927, c. 206, s. 5; 1929, c. 137, s. 5; 1931, c. 29, s. 5; 1933, c. 217, s. 5; 1935, c. 97, s. 5; 1937, c. 72, s. 5; 1939, c. 31, s. 5; 1941, c. 51, s. 5; 1943, c. 58, s. 5; 1945, c. 153, s. 5; 1947, c. 24, s. 5; 1949, c. 681, s. 5; 1951, c. 78, s. 1; 1951, c. 1119, s. 5.)

Editor's Note. — The second 1951 act, effective April 14, 1951, re-enacted this section in the language set out above. The first 1951 act, effective February 20, 1951, had previously rewritten this section to read as follows: "Special superior court judges are hereby vested with the same power and authority in all matters whatsoever, in the courts in which they are assigned to hold, that regular judges holding the same courts would have. A special judge duly assigned to hold the courts of a county or judicial district shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later."

No Jurisdiction When Not Holding Term of Court. — A special or emergency judge has no authority to determine a controversy without action at chambers when not holding a term of court. *Greene v. Stadiem*, 197 N. C. 472, 149 S. E. 685 (1929). See also *Bohannon v. Virginia Trust Co.*, 198 N. C. 702, 153 S. E. 263 (1930), and cases cited under § 7-63.

Motions in Cause Made at Term.—Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent this section has full constitutional sanction. *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445 (1943).

Special Judge May Hear Matter Out of Term by Consent.—Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term nunc pro tunc. *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445 (1943).

Proceeding to Obtain Custody of Child.—A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In *re Cranford*, 231 N. C. 91, 56 S. E. (2d) 35 (1949).

Motion for Alimony. — Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce a vinculo pending in another county of the district and continued to be heard before a judge regularly holding the terms of court in that district. Public Laws 1929, c. 137, under which the special judge was commissioned, provided that writs, orders and notices shall be returnable before special judges only in the county where the suit, proceeding or other cause is pending, unless such special judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge. *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719 (1930).

Cited in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942) (dis. op.).

§ 7-59. Salary and expenses; terms; practice of law.—The special judges so appointed shall receive the same salary and traveling expenses as now are, or may be, paid or allowed to judges of the superior court for holding their regularly assigned courts, and they shall hold all such regular and special terms

of court as they may be directed and assigned by the Chief Justice of the Supreme Court to hold, without additional compensation: Provided, that no person appointed under §§ 7-54 to 7-61 shall engage in the practice of law. (1927, c. 206, s. 6; 1929, c. 137, s. 6; 1931, c. 29, s. 6; 1933, c. 217, s. 6; 1935, c. 97, s. 6; 1937, c. 72, s. 6; 1939, c. 31, s. 6; 1941, c. 51, s. 6; 1943, c. 58, s. 6; 1945, c. 153, s. 6; 1947, c. 24, s. 6; 1949, c. 681, s. 6; 1951, c. 491, s. 1; 1951, c. 1119, s. 6.)

Editor's Note.—The 1947 act omitted the word "private" formerly appearing before the word "practice" in the last line. The first 1951 act substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-60. Powers after commission expires.—The special judges herein provided for are hereby fully authorized and empowered to settle cases on appeal and to make all proper orders in regard thereto after the time for which they were commissioned has expired. (1927, c. 206, s. 7; 1929, c. 137, s. 7; 1931, c. 29, s. 7; 1933, c. 217, s. 7; 1935, c. 97, s. 7; 1937, c. 72, s. 7; 1939, c. 31, s. 7; 1941, c. 51, s. 7; 1943, c. 58, s. 7; 1945, c. 153, s. 7; 1947, c. 24, s. 7; 1949, c. 681, s. 7; 1951, c. 1119, s. 7.)

§ 7-61. Effect on sections 7-50 and 7-51.—Nothing in §§ 7-54 to 7-60 shall in any manner affect §§ 7-50 to 7-51. (1927, c. 206, s. 8; 1929, c. 137, s. 8; 1931, c. 29, s. 8; 1933, c. 217, s. 8; 1935, c. 97, s. 8; 1937, c. 72, s. 8; 1939, c. 31, s. 8; 1941, c. 51, s. 8; 1943, c. 58, s. 8; 1945, c. 153, s. 8; 1947, c. 24, s. 8; 1949, c. 681, s. 8; 1951, c. 1119, s. 8.)

§ 7-61.1. Powers of elected judges holding courts by assignment, exchange or otherwise.—A judge of the superior court elected by a vote of the people or his successor appointed to fill a vacancy as provided by law, duly assigned to hold the courts of a county or judicial district, or holding such courts by exchange or otherwise as provided by law, shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later. (1951, c. 740.)

§ 7-62. Disposition of motions where judge disqualified.—Whenever the judge before whom any motion is made, either at term time or at chambers, shall disqualify himself from determining it, he may in his discretion refer the same for disposition to the resident judge of any adjoining district, who shall have full power and authority to hear and determine the cause in the same manner as if he were the presiding judge of the district in which the cause arose. (1939, c. 48.)

ARTICLE 8.

Jurisdiction.

§ 7-63. Original jurisdiction.—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof. (Const., art. 4, ss. 12, 27; 1879, c. 92, s. 11; 1881, c. 210; Code, s. 922; 1889, c. 504, s. 2; Rev., s. 1500; C. S., s. 1436.)

- I. In General.
- II. Actions Ex Contractu.
 - A. Jurisdiction Generally.
 - B. Essentials.
 - 1. The Amount.
 - a. In General.
 - b. Previous Remission.
 - 2. Good Faith.
- III. Actions Ex Delicto.
- IV. Criminal Actions.
 - A. Generally.
 - B. Essentials of Indictment.
- V. Equitable Jurisdiction.

Cross Reference.

As to jurisdiction of justices of the peace, see § 7-121.

I. IN GENERAL.

Constitutionality of Section.—The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV, § 12; *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482 (1924).

The constitutional jurisdiction of the superior court, generally, may be stated as intermediate between the Supreme Court and the courts of justices of the peace. *Mott v. Board*, 126 N. C. 866, 36 S. E. 330 (1900).

Construction with Other Sections.—This section defining the jurisdiction of the superior court, means only the jurisdiction which is necessary to be set out in good faith to confer original jurisdiction on that court of the action, and must be construed in connection with § 1-123, authorizing a joinder of additional causes of action, which may be of "any" amount, and § 1-135, par. 2, and § 1-137, authorizing counterclaims also, without any limitation as to the amount. Either of these three sections is as valid as the other, and all three must be construed together. There is no conflict between them. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

Distribution of Jurisdiction Question of Procedure.—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

General Jurisdiction of Superior Court.—The jurisdiction of the superior court is

general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving it, either exclusively or concurrently, to other courts. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

The superior court, under the provisions of this section, has exclusive original jurisdiction in all cases when it is not given to some other court. *State v. Waldrop*, 63 N. C. 507 (1869).

The superior court is a court of general common-law jurisdiction, with power to try all actions founded on contract, where the principal sum demanded is above \$200, and such other actions which have been or may be allotted to it by the General Assembly, within the limits of the Constitution. *Walton v. Walton*, 80 N. C. 26 (1879).

The superior court is one of general jurisdiction, being the highest court of original jurisdiction in the State, and it may take cognizance of all suits, which are not taken from it by statute. *State v. Garland*, 29 N. C. 48 (1846).

A nonresident plaintiff may maintain an action against the initial and nonresident carrier, the cause being transitory. *McGovern v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534 (1920).

Power to Give Complete Relief.—Where superior court acquires jurisdiction of any part of the matter involved in a suit it will proceed to determine the whole. *Baker v. Carter*, 127 N. C. 92, 37 S. E. 81 (1900).

Action Wrongfully Instituted.—Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. In re *Anderson*, 132 N. C. 243, 43 S. E. 649 (1903); *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116 (1903); *Smith v. Gudger*, 133 N. C. 627, 45 S. E. 955 (1903).

Whether Action in Tort or on Contract.—To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the complaint alleges the wrongful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort within the original jurisdiction of the superior court under Const., Art. 4, § 27, and this and § 7-122, and not

an action on contract within the jurisdiction of a justice of the peace under § 7-121. *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515 (1928).

Action in Summary Ejectment. — Superior courts and courts of justices of the peace have concurrent jurisdiction of actions in summary ejectment. *Stonestreet v. Means*, 228 N. C. 113, 44 S. E. (2d) 600 (1947).

Awarding Custody of Child.—After a decree for absolute divorce entered by the Recorder's Court of Nash County, the court entered an order awarding the custody of the child of the marriage under § 50-13, and defendant appealed to the superior court. It was held that if the recorder's court had jurisdiction to enter the order, the hearing in the superior court on appeal was *de novo*, while if the jurisdiction of the recorder's court did not include jurisdiction to award the custody of the child, the petition might be considered an application to the judge of the superior court, and the superior court had jurisdiction to enter a different order awarding the custody of the child, since in no event was its jurisdiction derivative. *Brake v. Brake*, 228 N. C. 609, 46 S. E. (2d) 643 (1948).

Demurrer for Lack of Jurisdiction. — Where it appears from the complaint in an action brought in the superior court that a good cause of action is alleged in the amount cognizable only in the court of the justice of the peace, and recovery cannot be had for the difference in amount necessary to sustain the jurisdiction of the superior court, a demurrer should be sustained. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482 (1924).

Construction of Complaint.—Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the superior court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is *ex contractu* or *ex delicto*, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. *Mitchem v. Pasour*, 173 N. C. 487, 92 S. E. 322 (1917).

Quoted in *Albertson v. Albertson*, 207 N. C. 547, 178 S. E. 352 (1935).

Applied in *Bryan v. Street*, 209 N. C. 284, 183 S. E. 366 (1936).

Cited in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942); *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943) (con. op.); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394 (1946).

II. ACTIONS EX CONTRACTU.

A. Jurisdiction Generally.

Cross Reference.—Generally as to jurisdiction of justices of the peace in actions on contract, see § 7-121 and note.

When Jurisdiction Assumed. — By this section exclusive original jurisdiction is conferred on courts of a justice of the peace in actions *ex contractu* where the amount demanded does not exceed the sum of two hundred dollars, and in the superior court where the demand exceeds that sum, the jurisdiction of the latter court depending upon whether from the pleadings it may be seen that it was made in good faith, and whether the allegations of the complaint sufficiently allege a good cause of action to sustain the jurisdiction sought. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482 (1924).

Test.—The aggregate sum demanded in good faith is the test of jurisdiction. *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232 (1892); *Boyd v. Roanoke R., etc., Co.*, 132 N. C. 184, 43 S. E. 631 (1903).

Amendment after Verdict. — Where a complaint does not state the sum demanded, and a verdict is rendered for less than \$200, the trial court may allow the complaint to be amended after verdict so as to make the claim more than \$200, and the superior court has jurisdiction if the claim was made in good faith. *Boyd v. Roanoke R., etc., Co.*, 132 N. C. 184, 43 S. E. 631 (1903).

B. Essentials.

1. The Amount.

a. In General.

Separate Items.—Where the items of an account are incurred under different contracts, an action may be brought on each item before a justice of the peace, the separate item being less than \$200. *Copland v. Tel. Co.*, 136 N. C. 11, 48 S. E. 501 (1904).

Under Single Contract.—Where a single contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to "split up" the account and recover upon each item. *Jarrett v. Self*, 90 N. C. 478 (1884).

Action to Recover Loan.—The superior court has not original jurisdiction of an action by a stockholder in an insurance company doing business as a building and loan association, against the company, to recover an overpayment of interest on a loan, where the amount sought to be recovered

is less than \$200. *Gillam v. Life Ins. Co.*, 121 N. C. 369, 28 S. E. 470 (1897).

Waiver of Tort. — The superior court possesses no jurisdiction in actions in which a tort is waived and suit is brought on an implied contract for a claim less than \$200. *Winslow v. Weith*, 66 N. C. 432 (1872).

Less than Statutory Amount. — In an action, founded on an implied contract, by the sheriff against his deputy for a misfeasance in office, the superior court has no jurisdiction where the amount demanded is less than \$200. *Latham v. Rollins*, 72 N. C. 454 (1875).

Where Recovery of Jurisdictional Amount Impossible. — The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as \$200. *Howard v. Mutual, etc., Life Ins. Ass'n*, 125 N. C. 49, 34 S. E. 199 (1899); *Sloan v. Carolina Cent. R. Co.*, 126 N. C. 487, 36 S. E. 21 (1900).

b. Previous Remission.

The fact that plaintiff has remitted damages in excess of \$200 in his action sued on in the justice's court does not necessarily oust the jurisdiction of the superior court in an action brought on the same contract there. *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724 (1912).

But the superior court has no jurisdiction of an action to recover upon a running account of \$312, where it is shown that from time to time the defendant had reduced the amount by sundry payments to a sum under \$200 at the time the action is brought. *Wiserman v. Witherow*, 90 N. C. 140 (1884).

2. Good Faith.

Generally.—It is the amount demanded in good faith (definable as an honest purpose plus relation to the facts alleged in the complaint as a whole which reasonably tend to support it), that fixes the jurisdiction of the court. *Thompson v. Southern Express Co.*, 144 N. C. 389, 57 S. E. 18 (1907); *Wooten v. Biggs Drug Co.*, 169 N. C. 64, 85 S. E. 140 (1915).

While the sum demanded ordinarily determines the jurisdiction, yet the plaintiff must make his demand in good faith and not for the purpose of giving the court jurisdiction. *Wiserman v. Witherow*, 90 N. C. 140 (1884).

Bona Fide Contention.—In an action involving the construction of a contract, where it is apparent that there was a bona fide contention for more than \$200, the superior court has jurisdiction. *Horner*

School v. Westcott, 124 N. C. 518, 32 S. E. 885 (1899).

III. ACTIONS EX DELICTO.

Constitution and Statute.—Under our Constitution and statute jurisdiction is conferred upon a justice of the peace concurrent with that of the superior court of all actions of tort wherein the plaintiff, in good faith, states or limits his demand at fifty dollars, or less. *Houser v. Bonsal & Co.*, 149 N. C. 51, 62 S. E. 776 (1908).

Failure to Prove Allegation in Entirety.—Where a cause of action within the jurisdiction of the superior court is alleged in good faith, jurisdiction is not lost by failure to prove the allegation in its entirety, and in an action in tort the superior court has jurisdiction though the sum demanded is less than \$200. *Fields v. Brown*, 160 N. C. 295, 76 S. E. 8 (1912).

Conversion.—The superior court has jurisdiction of an action for damages for the conversion of property where the amount claimed is one hundred and twenty-five dollars. *Asher v. Reizenstein*, 105 N. C. 213, 10 S. E. 889 (1890).

Deceit and False Warranty.—An action for deceit and false warranty, in the sale of a horse, is cognizable in the superior court, though the damages claimed amount only to fifty dollars. *Ashe v. Gray*, 88 N. C. 190 (1883).

In *Long v. Fields*, 104 N. C. 221, 10 S. E. 253 (1889), it was said: "It has been settled by a line of decisions in this court, and manifestly upon mature consideration, that where there is a warranty of soundness in the sale of a horse, the vendee may declare in tort for a false warranty and add a count in deceit, or, under the new procedure, a second cause of action in the nature of deceit, and though the sum demanded be less than \$200 the action will not be deemed one founded on contract, and the superior court will have jurisdiction." *Bullinger v. Marshall*, 70 N. C. 520 (1874); *Ashe v. Gray*, 88 N. C. 190 (1883); *Ashe v. Gray*, 90 N. C. 137 (1884); *Harvey v. Hambright*, 98 N. C. 446, 4 S. E. 187 (1887).

Same—Proof of Guilty Knowledge.—The complaint being for a tort, sustains the jurisdiction, though the charge of a guilty knowledge of the falsity of the representations which influenced the plaintiff in making the contract of exchange may not have been proved, and for the want of which no issue was asked to be made up. *Fields v. Brown*, 160 N. C. 295, 76 S. E. 8 (1912).

Waiver of Tort.—Plaintiff may waive the tort and sue in contract. *Bullinger v.*

Marshall, 70 N. C. 520 (1874); McDonald v. Cannon, etc., Co., 82 N. C. 245 (1880). But where this course is pursued, it is incumbent upon the plaintiff to allege in good faith a claim amounting to more than \$200. Winslow v. Weith, 66 N. C. 432 (1872).

Where, in an action for damages in the sum of \$125, for the conversion of certain cotton, the complaint alleged that the plaintiff sold to the defendants two bales of cotton at a certain price per pound on the terms that the price was to be paid down and no title to pass until the price was paid, and the defendants, on getting possession of the cotton, refused to pay the price, it was held, that the superior court had jurisdiction. In such case the plaintiffs might have affirmed the contract and sued for the price agreed to be paid (less than \$200), and then a justice of the peace would have had jurisdiction of the action. McDonald v. Cannon, etc., Co., 82 N. C. 245 (1880).

IV. CRIMINAL ACTIONS.

A. Generally.

Assaults and Batteries.—The superior court has original jurisdiction of assaults and batteries: 1st, when a deadly weapon is used; 2nd, when serious damage is done; 3rd, when the offense was committed six months (now twelve months) before the indictment was found, and no justice of the peace has taken cognizance of the offense. State v. Cunningham, 94 N. C. 824 (1886). See also, State v. Phillips, 104 N. C. 786, 10 S. E. 463 (1889).

Jurisdiction Attaches for All Crimes Included.—Having acquired cognizance of an imputed crime, which was assault with intent to commit rape, the court may proceed to dispose of the subordinate misdemeanor, of which it could not have taken jurisdiction as a distinct substantive offense until after the lapse of the specified time without judicial action commenced before a justice, it being not the purpose of the legislation to arrest further proceedings when the assumed jurisdiction was rightful, and neither offense is outside of that jurisdiction ultimately. State v. Reeves, 85 N. C. 553 (1881).

Charge Different from Case Made Out.—Where the indictment charges an assault with a deadly weapon, but the proof shows a simple assault, committed within less than six (now twelve) months since the finding of the bill, the jurisdiction of the superior court is not ousted, as the cases in which this would happen are limited to those in which the charge in itself is of a simple assault. State v.

Fesperman, 108 N. C. 770, 13 S. E. 14 (1891).

Manner of Excepting to Jurisdiction.—Exception to the jurisdiction of the superior court, for that six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instructions to the jury to acquit. State v. Earnest, 98 N. C. 740, 4 S. E. 495 (1887).

Misdemeanors.—The superior court has exclusive jurisdiction of misdemeanors where the punishment is not limited to a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. Washington v. Hammond, 76 N. C. 33 (1877).

B. Essentials of Indictment.

Twelve-Months Period.—An indictment for an affray need not aver that the offense was committed more than six months (now twelve) before the finding of the bill and that no justice has taken jurisdiction. State v. Moore, 82 N. C. 660 (1880).

Failure of Justice of Peace to Assume Jurisdiction.—When the superior court takes cognizance of such cases as the justices of the peace fail to assume jurisdiction of, it is not necessary to aver in the indictment the fact of the justice's omission in order to confer jurisdiction on the superior court. Nor is it material that the offense is alleged to have been committed on a day more than six months (now twelve) before the finding of the indictment, in the indictment itself, as the date is not traversible and is not fixed on the verdict. State v. Porter, 101 N. C. 713, 7 S. E. 902 (1888).

Use of Deadly Weapon.—This section does not render it necessary that a bill found by the grand jury of the superior court for an assault and battery should aver that a deadly weapon was used, that any serious damage was done, that six months had elapsed before the finding of the bill, or that the offense was committed within one mile of the court during the session thereof. The defendant, under the plea of not guilty, may negative the existence of the jurisdictional facts. State v. Taylor, 83 N. C. 602 (1880).

Matter of Defense.—Upon the trial of an indictment for simple assault, the superior court *prima facie* has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N. C. 740, 4 S. E. 495 (1887).

V. EQUITABLE JURISDICTION.

Generally.—The superior court possesses the same equitable jurisdiction,

when not limited by statute, formerly exercised by courts of equity. *Seattle v. Seattle*, 141 N. C. 553, 54 S. E. 445 (1906).

Over Property of Infants.—The superior courts in their equity jurisdiction have inherent authority over the property of infants, since they stand in loco parentis and have the same jurisdiction in this respect as that of the English High Courts of Chancery. *Coxe v. Charles Stores Co.*, 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 959 (1939).

Interpleader.—Where the controversy involves an action in the nature of a bill of interpleader to determine the right of two adverse claimants to a fund, jurisdiction of the superior court attached upon the ground that it is an exercise of the powers of the court enforceable by a bill in equity under the old system. *Timber Co. v. Wells*, 171 N. C. 262, 88 S. E. 327 (1916).

Foreclosure of Mortgages.—Because of the equity growing out of the relation of mortgagor and mortgagee when the latter seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction when the

amount secured is for a less sum than two hundred dollars. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

Subrogation.—The superior court has jurisdiction of an action by a creditor seeking to be subrogated to the rights of other creditors of the same debtor whose claims he had paid. *Fidelity Co. v. Jordan*, 134 N. C. 236, 46 S. E. 496 (1904).

To Establish Claim against Married Woman.—A proceeding to establish a claim against a feme covert and to have a lien declared for materials furnished, etc., must be brought before a justice, if the amount claimed is under \$200. It is when the proceeding is not under the statute, but is equitable in nature, as a bill for foreclosure of a mortgage, that the superior court has jurisdiction. *Smaw v. Cohen*, 95 N. C. 85 (1886).

Debtor a Lunatic.—The superior court has jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy. *Blake v. Respass*, 77 N. C. 193 (1877).

§ 7-64. Concurrent jurisdiction.—In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent act of the General Assembly, and shall not be repealed by implication or by general repealing clauses in any act of the General Assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may be hereafter enacted. Appeal shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided, that this section shall not apply to the counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, Guilford, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren. (1919, c. 299; C. S., s. 1437; 1923, c. 98; 1941, c. 265; 1945, c. 164; 1945, c. 628, s. 1.)

Editor's Note.—The 1941 amendment rewrote this section.

The 1945 amendments struck out "Cumberland" and "Halifax" from the list of counties exempted from the provisions of this section, thereby making it applicable to said counties.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 472.

Only One Prosecution.—Where two courts have concurrent jurisdiction of an offense, the judgment of that one which first passes judgment is a good defense against a prosecution in the other court for the same offense. *State v. Bowers*, 94 N. C. 910 (1886).

Court First Taking Cognizance Excludes Other Court.—Where a recorder's court and the superior court have concurrent jurisdiction, the court first taking cognizance of the offense has jurisdiction thereof to the exclusion of the other. *State v. Reavis*, 228 N. C. 18, 44 S. E. (2d) 354 (1947).

Where Record Failed to Show Conflict of Jurisdiction.—While an appeal from a judgment of recorder's court upon warrant charging unlawful possession of intoxicating liquor for the purpose of sale on a certain date was pending in superior court, that court did not have jurisdiction to try defendant on a bill of indictment, of

later date than the warrant, charging the same offense, where the record contained nothing to show that the offenses were the same. Hence, the record failed to present conflict of jurisdiction between recorder's court under § 7-222, and superior court under this section. *State v. Sudreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

Prisoner Bound Over to Superior Court.

—Where a recorder's court and the superior courts have concurrent jurisdiction of a criminal offense and the judge of the former court acts within his powers of

committing magistrate, and binds the prisoner over to the superior court, objection that the recorder's court had thereby taken jurisdiction of the offense is untenable, and neither will a motion to quash the indictment, nor a plea in abatement be sustained. *State v. Shemwell*, 180 N. C. 718, 104 S. E. 885 (1920).

Applied in *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738 (1932).

Cited in *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943) (con. op.); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394 (1946).

§ 7-65. Jurisdiction in vacation or at term.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term: Provided, that in all matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of term or in term time: Provided, further, that all matters and proceedings heretofore passed upon by the resident judge of the judicial district according to and in conformity with the proviso first above set forth, prior to the date of the ratification of this act, are hereby validated and declared to be in full force and effect, and all decisions, orders, decrees and judgments of whatsoever nature and kind heretofore entered and signed by the resident judge of the judicial district prior to the date of the ratification of this act and according to and in conformity with the proviso first above set forth, are hereby validated and declared to be lawful, in full force and effect and binding upon the parties thereto, except that nothing herein contained shall be construed as applicable to or in any manner affecting pending litigation. (1871-2, c. 3; Code, c. 10, s. 230; Rev., s. 1501; C. S., s. 1438; 1939, c. 69; 1945, c. 142; 1951, c. 78, s. 2.)

Editor's Note.—The 1939 amendment added the second sentence of this section, and the 1945 amendment added the provisos thereto.

The 1951 amendment inserted in the second sentence and in the first proviso thereto the references to any special superior court judge residing in the district.

As to jurisdiction of resident judge, see 23 N. C. Law Rev. 329.

Motions.—After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. *May v. Nat. Fire Ins. Co.*, 172 N. C. 795, 90 S. E. 890 (1916).

Interlocutory Order.—It seems that the superior court has power to make an

amendment to an interlocutory order in an ancillary proceeding out of term. *Coater Bros. v. Wilkes*, 94 N. C. 174 (1886).

Consent of Parties.—A judge has no power to render judgment after the expiration of the term of court without the consent of parties. *Hardin v. Ray*, 89 N. C. 364 (1883).

By consent, the superior court can grant judgment in civil cases in vacation. *Coater Bros. v. Wilkes*, 94 N. C. 174 (1886).

The Resident Judge.—The resident judge of a district has no other power within such district in vacation than any other judge of the superior court. *State v. Ray*, 97 N. C. 510, 1 S. E. 876 (1887).

The judge holding the courts of a judicial district has authority to act in all matters within the jurisdiction of the superior court, with the consent of the parties, by

signing judgments out of term and in or out of the county and out of the district. *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942).

Jurisdiction to Order Payment of Expenses Out of the Recovery.—In an action by taxpayers against public officers under § 128-10, to recover public funds unlawfully expended, plaintiffs disclaimed in their complaint any right personally to participate in the recovery. After recovery, and the entry of a consent judgment dismissing appeals, and after payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is then without jurisdiction under this section to order payments, out of the recovery, of such petitioner's expenses and counsel fees. *Hill v. Stanbury*, 224 N. C. 356, 30 S. E. (2d) 150 (1944), commented on in 23 N. C. Law Rev. 40.

Proceeding to Obtain Custody of Child.—A special judge has concurrent jurisdic-

tion with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. *In re Cranford*, 231 N. C. 91, 56 S. E. (2d) 35 (1949).

Resident judge issued order to defendant wife to appear outside county and outside district to show cause why temporary order awarding custody of children to husband should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. (2d) 658 (1949).

Stated in State Distributing Corp. v. Travelers Indemnity Co., 224 N. C. 370, 30 S. E. (2d) 377 (1944) (dis. op.).

§ 7-66. Appellate jurisdiction.—The superior court has appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided by law. (Const., art. 4, ss. 12, 27; Code, s. 923; Rev., s. 1502; C. S., s. 1439.)

Cross References.—As to appeal from clerk to judge, see §§ 1-272 through 1-276. As to appeals from justices of the peace, see § 7-195 and notes. As to appeals from other inferior courts, see §§ 7-195, 7-230, 7-253, 7-292, 7-295, 7-313, 7-343, 7-378, 7-393, 7-442. As to appeal from Utilities Commission, see § 62-20 and notes. As to appeal from Industrial Commission, see § 97-61. As to appeals from Unemployment Compensation Commission, see § 96-15.

General Appellate and Supervisory Powers.—The Constitution and statutes vest in the superior court general appellate and supervisory powers over the judicial action of all the inferior courts of the State. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 987 (1916).

The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Appeals from Justice of Peace.—In cases where bills are found in the superior court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the superior court has none. *Page v. Page*, 167 N. C. 350, 83 S. E. 627 (1914).

§ 7-67. Transfer of cases pending in abolished inferior court.—In case of the abolition of any court inferior to the superior court (except courts of the justices of the peace), all cases and matters then in such court, not finally disposed of, and all records of such court, shall forthwith be transferred and delivered to the superior court of the county in which such inferior court has functioned, for trial or other disposition of such cases and matters as may be necessary and proper.

The superior court to which such cases and matters are transferred shall have the power and jurisdiction to hear, deal with and dispose of the same to the same extent as would said inferior court had its existence continued. (1941, c. 117.)

Court Abolished Pending Appeal.—Where the municipal court in which the case is originally tried is abolished pending the decision of the Supreme Court

granting a new trial, the cause will be remanded to the superior court of the county. *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379 (1941).

ARTICLE 9.

Judicial and Solicitorial Districts and Terms of Court.

§ 7-68. **Number of districts.**—The State shall be divided into twenty-one superior court judicial districts, numbered first to twenty-first, composed of the counties hereinafter designated.

As required by the Constitution, article IV, section twenty-three, as amended, the State shall be divided into twenty-one solicitorial districts, numbered first to twenty-first, which districts shall be the same as the judicial districts hereinafter designated. The solicitors elected for the twenty-one judicial districts, respectively, in the general election held on November third, one thousand nine hundred and forty-two, shall be the solicitors, respectively, of the twenty-one solicitorial districts hereby created. (1913, cc. 63, 196; C. S., s. 1441; 1937, c. 413, s. 1; 1943, c. 134, s. 2.)

Editor's Note.—Prior to the 1937 amendment there were twenty districts. paragraph of this section. It also inserted "solicitorial" in the article heading.

The 1943 amendment added the second

§ 7-69. **Eastern and western judicial divisions.**—The State shall be divided into two judicial divisions, the Eastern and Western Judicial Divisions. The counties which are now or may hereafter be included in the judicial districts from one to ten, both inclusive, shall constitute the Eastern Division, and the counties which are now or may hereafter be included in the judicial districts from eleven to twenty-one, both inclusive, shall constitute the Western Division. The judicial districts shall retain their numbers from one up to twenty-one, and all such other districts as may from time to time be added by the creation of new districts shall be numbered consecutively. (1915, c. 15; C. S., s. 1442; 1937, c. 413, s. 2.)

Editor's Note.—The 1937 amendment substituted "twenty-one" for "twenty" formerly appearing in this section.

§ 7-70. **Terms of court.**—A superior court shall be held by a judge thereof at the courthouse in each county. The twenty-one judicial districts of the State shall be composed of the counties designated in this section, and the superior courts in the several counties shall be opened and held in each year at the times herein set forth. Each court shall continue in session one week, and be for the trial of criminal and civil cases, except as otherwise provided, unless the business thereof shall be sooner disposed of. Each county shall have the number of regular weeks of superior court as set out in this section: Provided, however, that the schedule of courts of any county or judicial district may be revised or reformed and the number of terms of court may be increased or decreased from time to time as may appear advisable to the court calendar commission; which said commission shall be composed of the Chief Justice of the Supreme Court and four judges of the superior court, to be appointed by the Governor for a period of four years each. The members of said commission shall serve without compensation other than their necessary expenses incurred in attending meetings of said commission. (1913, cc. 63, 196; C. S., s. 1443; 1937, c. 408.)

Eastern Division**First District**

The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Currituck—First Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; C. S., s. 1443; Ex. Sess. 1920, c. 23, s. 2; 1939, c. 59; 1945, c. 179.)

Camden—First Monday after the first Monday in March and the last Monday

in August. (1913, c. 196; C. S., s. 1443; 1921, c. 105; 1937, c. 283, s. 1; 1943, c. 376.)

Pasquotank—Eighth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March to continue for three weeks, the first week for the trial of civil cases only and the second and third weeks for the trial of criminal cases only; second Monday after the first Monday in March for the trial of civil cases only; ninth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; second Monday after the first Monday in September for the trial of civil cases only; fifth Monday after the first Monday in September to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September to continue for two weeks, the first week for the trial of civil cases only and the second week for the trial of criminal cases only. (1913, c. 196; Ex. Sess., 1913, c. 51; C. S., s. 1443; 1921, c. 105; 1923, c. 232; Pub. Loc. 1925, c. 631; 1929, c. 167; 1933, cc. 3, 129; 1949, c. 878.)

Perquimans—Fifth Monday before the first Monday in March for civil cases only; sixth Monday after the first Monday in March; fourth Monday after the first Monday in September for civil cases only, for which term a special judge shall be assigned by the Chief Justice of the Supreme Court to hold the same; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess., 1913, c. 51; C. S., s. 1443; 1931, c. 6; 1933, c. 286; 1949, c. 266; 1951, c. 57.)

Chowan—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in March to continue for one week, for the trial of civil cases only; first Monday after the first Monday in September; twelfth Monday after the first Monday in September. (1913, c. 196; C. S., s. 1443; 1931, c. 87; 1933, c. 456; 1937, c. 102; 1941, c. 367, s. 1.)

Gates—Third Monday after the first Monday in March; eleventh Monday after the first Monday in September. (1913, c. 196; C. S., s. 1443; 1935, c. 70.)

Dare—Twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; C. S., s. 1443.)

Tyrrell—Seventh Monday after the first Monday in March; fourth Monday after the first Monday in September, and for this term a special judge may be assigned; fourth Monday before the first Monday in March, for civil cases only. Upon recommendation of the local bar, the board of commissioners for the county of Tyrrell, at their option, may abolish and suspend the opening and holding, in any year, of the term above provided for the week commencing on the fourth Monday before the first Monday in March, by notifying the Governor and the judge scheduled to hold said term, at least thirty days prior to the date for opening same, that such term of court is not desired. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 1; C. S., s. 1443; Ex. Sess. 1920, c. 23, s. 1; 1921, c. 83; Ex. Sess. 1921, c. 19; 1923, c. 124; Pub. Loc. 1925, c. 389; 1927, c. 123; 1931, c. 92; 1933, c. 126.)

Hyde—Eleventh Monday after the first Monday in March; sixth Monday after the first Monday in September.

In addition to the terms of court now provided by law to be held in Hyde County, the following term of court shall be opened and held in each year, except as hereinafter provided, in the manner and at the time herein set forth, to-wit: To convene on the third Monday in August of each year and to continue for one week for the trial of civil cases only. If the judge regularly assigned to the district in which said court is situate be unable to hold any term of court provided in the first sentence of this paragraph, for any cause set out in article four, section eleven of the Constitution, the Governor may appoint a judge to hold such term from among the regular, special or emergency judges. If, in the

opinion of the board of commissioners of Hyde County, it is not advisable or necessary to hold said additional term of court, and such fact is so stated in a resolution duly adopted by a majority of said board on or before the second Monday in July next preceding the day for the convening of said term, then said term shall not be held on the third Monday in August of that year as provided in this paragraph. Upon the adoption of such a resolution, the clerk of said board shall immediately notify the judge, who has been assigned to hold the additional term, that the same will not be held, and no jury for the said term shall be drawn; but if no such resolution shall be adopted on or before the second Monday in July as provided above, then it shall be the duty of the board of commissioners to cause the jury to be drawn in the manner now prescribed by law for the drawing of a jury for the trial of civil cases in regular terms of the superior court. (1913, c. 196; C. S., s. 1443; 1935, c. 191; 1941, c. 367, s. 1.)

Beaufort—Seventh Monday before the first Monday in March for two weeks, the first week for criminal cases only, and the second week for criminal and civil cases; second Monday before the first Monday in March for two weeks for civil cases only; second Monday after the first Monday in March for criminal cases only; fifth Monday after the first Monday in March for civil cases only; ninth Monday after the first Monday in March for two weeks for civil cases only; sixteenth Monday after the first Monday in March for the trial of criminal and civil cases; second Monday after the first Monday in September for the trial of criminal cases with a grand jury in attendance; third Monday after the first Monday in September for civil cases only; fifth Monday after the first Monday in September for civil cases only; ninth Monday after the first Monday in September for criminal cases and consent trials and decrees in civil cases; thirteenth Monday after the first Monday in September for civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, ss. 3, 4; C. S., s. 1443; 1927, c. 111; 1931, cc. 4, 8, 87; 1933, c. 3; 1933, c. 456, s. 2; 1935, c. 176; 1937, c. 40; 1937, c. 283, s. 2.)

Second District

The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Washington—Eighth Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; seventh Monday after the first Monday in September, for civil cases only. (1913, cc. 63, 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 2; 1919, c. 133; C. S., s. 1443; 1923, c. 227; 1929, c. 54.)

Martin—Second Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March; second Monday after the first Monday in September, to continue for two weeks; fourteenth Monday after the first Monday in September; sixth Monday after the first Monday in March and eleventh Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases only. For the last two terms of court the Governor is hereby directed to appoint a judge to hold the same from among the regular or emergency judges. (1913, c. 196; 1919, c. 133; C. S., s. 1443; 1924, c. 12; 1929, c. 124.)

Edgecombe—Sixth Monday before the first Monday in March; first Monday in March; fourth Monday after the first Monday in March, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September; sixth Monday after the first Monday in September; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

The grand jury drawn by the commissioners of Edgecombe County for the term of court beginning on the sixth Monday before the first Monday in March of each year shall also serve as the grand jury for the term beginning on the first Monday in March and on the thirteenth Monday after the first Monday in

March, and shall be charged with the same duties and clothed with the same power at each of said terms and shall receive for each term such mileage and compensation as is now provided by law. (1913, c. 196; Ex. Sess. 1913, c. 17; 1915, c. 107; 1917, c. 12; 1919, c. 133; C. S., s. 1443; Ex. Sess. 1921, c. 108, s. 1; 1923, c. 246; 1927, c. 128; 1941, cc. 2, 32.)

Nash—Fifth Monday before the first Monday in March; second Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only; first Monday after the first Monday in March; seventh Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; twelfth Monday after the first Monday in March; first Monday before the first Monday in September; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for the term of court the Governor is hereby directed to appoint a judge, other than the judge holding courts of the second judicial district, to hold the same from among the regular, special or emergency superior court judges; fifth Monday after the first Monday in September, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of criminal cases and the second week for the trial of civil cases only. The court shall have jurisdiction to try and determine civil actions and civil matters at any term of superior court held in Nash County, whether said term is designated above as a civil term or not: Provided, that any term of said court may be canceled by the board of commissioners of Nash County when in the opinion of the clerk of the superior court of Nash County and the resident judge of the second judicial district sufficient cause exists for the cancellation of said term. (1913, c. 196; 1915, c. 63; 1919, c. 133; C. S., s. 1443; Ex. Sess. 1921, c. 108; 1923, c. 237; 1924, c. 46; 1933, c. 145; 1935, c. 201; 1943, c. 687.)

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week to be for the trial of civil cases only and the second week to be for the trial of criminal cases only; ninth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only; eleventh Monday after the first Monday in March, for one week, for the trial of civil cases only; sixteenth Monday after the first Monday in March, for one week, for the trial of civil cases only; first Monday in September, for one week, for the trial of civil or criminal cases, or both; third Monday after the first Monday in September, for one week, for the trial of criminal cases only; fourth Monday after the first Monday in September, for one week, for the trial of civil cases only; seventh Monday after the first Monday in September, for one week, for the trial of criminal cases only; eighth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in September, for one week, for the trial of civil or criminal cases, or both. During the years 1951 and 1952, the following terms of court shall also be held in Wilson County: Fifth Monday before the first Monday in March, for one week, for the trial of civil cases only; first Monday before the first Monday in September, for one week, for the trial of civil cases only.

In case of conflict of any of the regularly established terms of the courts of the second judicial district with the terms above set out, the said terms of court here established shall be considered special terms, and the Chief Justice of the Supreme Court shall assign a regular, special or emergency judge to hold such said special terms. (1913, c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133; C. S., s. 1443; 1921, c. 10; 1937, c. 104; 1947, c. 1057; 1951, c. 1054, s. 1.)

Third District

The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Hertford—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue for two weeks, for the trial of

civil and criminal cases; the last Monday in July for one week; sixth Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; 1915, c. 282; 1919, c. 142; C. S., s. 1443; 1923, c. 113; 1924, c. 9; 1927, c. 118; 1929, c. 217; 1931, cc. 140, 200; 1935, cc. 102, 276; 1939, c. 40; 1947, c. 282; 1951, c. 468.)

Bertie—Third Monday before the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; tenth Monday after the first Monday in March, to continue for two weeks, for trial of both criminal and civil cases; first Monday before the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases; tenth Monday after the first Monday in September, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; C. S., s. 1443; Ex. Sess. 1921, c. 45; 1923, c. 185; 1931, cc. 192, 247; 1941, c. 367, s. 1; 1947, c. 61; 1951, c. 1139, s. 1.)

Northampton—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in September, each to continue for two weeks; first Monday in August to continue for one week. (1913, c. 196; C. S., s. 1443; 1929, cc. 123, 244; 1933, c. 409; 1935, c. 148; 1937, c. 64.)

Halifax—Fifth Monday before the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, to continue for two weeks, the first week for the trial of civil cases only, and the second week for the trial of civil cases and of criminal cases when the defendant is confined in jail or otherwise imprisoned; eighth Monday after the first Monday in March, for the trial of both criminal and civil cases, to continue for one week, and for this term of court the Chief Justice of the Supreme Court is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; thirteenth Monday after the first Monday in March to continue for two weeks, the first week of which shall be for the trial of civil cases only, and the second week for trial of criminal or civil cases, or both; third Monday before the first Monday in September to continue for two weeks, for the trial of civil and criminal cases; fourth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, and for this term of court the Chief Justice is hereby directed to appoint a judge to hold same from among the regular, special or emergency judges; seventh Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, and for this term of court the Chief Justice is hereby directed to appoint a judge to hold the same from among the regular, special or emergency judges; twelfth Monday after the first Monday in September, for the trial of civil and criminal cases, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 2; 1915, c. 78; C. S., s. 1443; 1924, c. 87; 1925, cc. 36, 47; 1929, c. 160; 1941, c. 367, s. 1; 1951, c. 1139, s. 2.)

Warren—Eighth Monday before the first Monday in March for criminal cases only; sixth Monday before the first Monday in March for civil cases only; ninth Monday after the first Monday in March for civil cases only; twelfth Monday after the first Monday in March for criminal cases only; first Monday after the first Monday in September for criminal cases only; fourth Monday after the first Monday in September for civil cases only; each to continue one week. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1917, c. 256; C. S., s. 1443; 1941, c. 367, s. 1; 1951, c. 1139, s. 3.)

Vance—Seventh Monday before the first Monday in March for criminal cases only; first Monday in March for criminal cases only; third Monday after the first Monday in March for civil cases only; fifteenth Monday after the first Monday in March for criminal cases only; sixteenth Monday after the first Monday in March for civil cases only; third Monday after the first Monday in September for criminal cases only; fifth Monday after the first Monday in September for civil cases only, each to continue one week. At any term for the trial of criminal

cases, civil cases may be tried by consent. (1913, c. 196; 1917, c. 256; C. S., s. 1443; 1925, cc. 66, 165; 1927, c. 169, s. 1; 1951, c. 1139, s. 4.)

Fourth District

The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wayne—Sixth Monday before first Monday in March, fifth Monday after the first Monday in March, twelfth Monday after the first Monday in March, second Monday before the first Monday in September, each to continue for one week; twelfth Monday after the first Monday in September, to continue for two weeks; fifth Monday before the first Monday in March, sixth Monday after the first Monday in March, thirteenth Monday after the first Monday in March, first Monday before the first Monday in September, each to continue for two weeks, for civil cases only; first Monday in March and fifth Monday after the first Monday in September, each to continue for two weeks, for civil cases only.

If no regular judge is available for the two weeks' term of court beginning on the first Monday in March, or for the second week of the terms beginning on the fifth Monday before the first Monday in March, or on the sixth Monday after the first Monday in March, or on the thirteenth Monday after the first Monday in March, or on the first Monday before the first Monday in September, the Governor may assign a special judge to hold said court. (1913, c. 196; C. S., s. 1443; 1927, c. 77; 1929, c. 132, s. 1; 1937, c. 192.)

Johnston—First Monday after the first Monday in March; third Monday before the first Monday in September, for criminal cases only; also the first Monday in March; the third Monday before the first Monday in March; sixth Monday after the first Monday in March; and sixth Monday after the first Monday in September, each for one week for criminal and civil cases; and the eighth Monday before the first Monday in March, two weeks for civil cases; and ninth Monday after the first Monday in September, two weeks for civil cases. The Governor shall assign some regular or special judge to hold said courts; fourteenth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in March; seventh Monday after the first Monday in March; and third Monday after the first Monday in September, each to continue for two weeks; and the last three terms for civil cases only; sixteenth Monday after the first Monday in March, for the trial of criminal cases only. (1913, c. 196; C. S., s. 1443; 1927, c. 190; 1929, c. 208; 1933, c. 81.)

Harnett—Eighth Monday before the first Monday in March, one week, for the trial of criminal cases only; fourth Monday before the first Monday in March to continue for two weeks, for the trial of civil cases only; second Monday after the first Monday in March, for the trial of criminal cases only; fourth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in March for the trial of civil cases only; eleventh Monday after the first Monday in March, one week, for the trial of criminal cases only; fourteenth Monday after the first Monday in March, two weeks, for the trial of civil cases only; first Monday in September for criminal cases only; second Monday after the first Monday in September for the trial of civil cases only; fourth Monday after the first Monday in September to continue for two weeks, civil cases only; tenth Monday after the first Monday in September to continue for two weeks, for the trial of criminal cases only.

If no regular judge is available for any cause set out in article four, section eleven, of the Constitution, for the one week term of court beginning on the second Monday after the first Monday in March, or on the first Monday in September, or for the two weeks term of court beginning on the fourth Monday after the first Monday in March, or on the fourth Monday after the first Monday in September, the Governor may assign a special judge to hold said court. (1913, c. 196; C. S., s. 1443; 1927, cc. 161, 212; 1931, c. 147; 1937, c. 105; 1941, c. 367, s. 1.)

Chatham—Seventh Monday before the first Monday in March, to continue one week for the trial of criminal and civil cases; the first Monday in March to continue one week for the trial of civil cases only; the second Monday after the first Monday in March to continue one week for the trial of civil cases only; tenth Monday after the first Monday in March to continue for one week for the trial of civil and criminal cases; fifth Monday before the first Monday in September to continue for two weeks for the trial of civil cases only; seventh Monday after the first Monday in September to continue for one week for the trial of criminal and civil cases. (1913, c. 196; 1917, c. 228; 1919, c. 35; C. S., s. 1443; Pub. Loc. 1925, c. 602; 1929, c. 169.)

Lee—Fifth Monday before the first Monday in March, to continue for two weeks, the first week for the trial of civil cases, the second week for the trial of criminal and civil cases, provided that, for this term, the Governor shall assign a judge to hold the same from among the regular, special or emergency judges; third Monday after the first Monday in March to continue for two weeks, the first week for the trial of criminal cases, and the second week for the trial of civil cases; fifteenth Monday after the first Monday in March, to continue for one week for the trial of civil cases, provided that for said term, the Governor shall assign a judge to hold the same from among the regular, special or emergency judges; seventh Monday before the first Monday in September, to continue for two weeks, the first week for the trial of criminal cases and the second week for the trial of civil cases; first Monday after the first Monday in September, to continue for two weeks for the trial of civil cases, provided that for the second week of said term, the Governor shall assign a judge to hold the same from among the regular, special or emergency judges; eighth Monday after the first Monday in September for one week for the trial of criminal cases; fourteenth Monday after the first Monday in September for one week for the trial of civil cases, provided that for said term, the Governor shall assign a judge to hold the same from among the regular, special or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228; C. S., s. 1443; 1929, c. 162; 1931, c. 86; 1939, c. 194; 1947, c. 385.)

Fifth District

The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt—Seventh Monday before the first Monday in March for civil cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March for civil cases only; second Monday after the first Monday in March for civil and criminal cases; third Monday after the first Monday in March for the trial of both civil and criminal cases; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March to constitute one term for the trial of criminal and civil cases; ninth Monday after the first Monday in March to continue for one week for the trial of civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases and criminal cases where defendants are confined in jail; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for civil cases only; fourth Monday after the first Monday in September, to continue for one week, for the trial of civil and criminal cases; fifth Monday after the first Monday in September, to continue for one week, for the trial of civil and criminal cases; seventh Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, to continue for one week for trial of civil cases. For the terms beginning the ninth Monday after the first Monday in March, and the eleventh Monday after the first Monday in September, the Governor may appoint

a judge to hold the same from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 25; 1915, cc. 111, 139; 1917, c. 217; 1919, c. 56; C. S., s. 1443; Ex. Sess. 1920, c. 29; 1921, c. 159; 1929, c. 153; 1931, c. 94; 1935, c. 73; 1939, c. 43; 1947, c. 686; 1949, cc. 867, 1246; 1951, c. 677.)

Craven—Eighth Monday before the first Monday in March and the thirteenth Monday after the first Monday in March, for the trial of civil cases and criminal cases; the first Monday in September, to continue for two weeks, for the trial of civil cases and criminal cases; fifth Monday after the first Monday in March for the trial of civil cases and criminal cases; fifth Monday before the first Monday in March to continue for one week for the trial of civil cases only; fourth Monday before the first Monday in March for the trial of civil cases only; third Monday before the first Monday in March for the trial of civil cases and criminal cases; fourth Monday after the first Monday in September and eleventh Monday after the first Monday in September, each to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in September for the trial of civil cases and criminal cases; tenth Monday after the first Monday in March for the trial of civil cases only. If the judge regularly holding the courts for the fifth judicial district is not available to hold the term beginning on the tenth Monday after the first Monday in September or the second week of the term beginning the first Monday in September, the Chief Justice of the Supreme Court shall assign a judge to hold the same from among the regular or special superior court judges. (1913, c. 196; 1915, c. 111; 1917, c. 217; C. S., s. 1443; 1929, c. 166; 1945, c. 42; 1947, c. 1034; 1949, c. 1187; 1951, c. 434.)

Panlico—Eighth Monday after the first Monday in March, and ninth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; C. S., s. 1443; 1921, c. 159.)

Jones—Fourth Monday after the first Monday in March; third Monday before the first Monday in September to continue for one week for civil cases only; fifth Monday after the first Monday in November; and second Monday after the first Monday in September.

If the judge regularly assigned to the district in which said county is situate be unable because of another regular term of court in said district, or for other cause, to hold any term of court provided in the preceding paragraph, the Governor may appoint a judge to hold such term from among the regular or emergency judges. (1913, c. 196; Ex. Sess. 1913, c. 19; P. L. 1915, c. 363; C. S., s. 1443; 1921, c. 159; 1937, c. 29; 1939, c. 283.)

Carteret—Fourteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, and sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; C. S., s. 1443; 1921, c. 159; 1929, c. 166, s. 2.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks; thirteenth Monday after the first Monday in September to continue for one week for the trial of both criminal and civil cases. And for this last mentioned term of court the Governor shall assign a judge from among the regular, special or emergency judges. Provided, that in all instances where there are consecutive weeks of superior court calendared for Greene County, each such week shall constitute a separate term of such court for all purposes whatsoever. (1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139; C. S., s. 1443; 1935, c. 109; 1947, c. 775.)

Sixth District

The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cross Reference.—As to provision relating to criminal terms, see paragraph at end of Sixth District.

Lenoir—Sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; second Monday before the first Monday in March, to continue for one week, for the trial of civil cases only; first Monday before the first Monday in March for the trial of civil cases only; second Monday after the first Monday in March, to continue for one week for the trial of criminal or civil cases or both; the Governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special superior court judges of North Carolina; seventh Monday after the first Monday in March, to continue for one week for the trial of criminal cases or civil cases, or both; tenth Monday after the first Monday in March, to continue for one week for the trial of civil cases only; eleventh Monday after the first Monday in March to continue for one week, for the trial of civil cases only; fourteenth Monday after the first Monday in March, to continue for one week for the trial of civil cases only; fifteenth Monday after the first Monday in March, to continue for one week, for the trial of civil cases only; sixteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal cases only; second Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; first Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases, or both; the Governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special judges of the State of North Carolina; third Monday after the first Monday in September, to continue for one week for the trial of civil cases only; eighth Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases or both; the Governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special superior court judges of North Carolina; ninth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for one week for the trial of criminal cases or civil cases or both; the Governor is hereby directed to appoint and assign a judge to hold the said term from among the regular or special judges of the State of North Carolina.

At all criminal terms of the superior court in the county of Lenoir, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters not requiring a jury, and make any order, judgment or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13; C. S., s. 1443; Pub. Loc. 1925, c. 5; 1931, c. 271; 1933, c. 234, s. 1; 1947, c. 909; 1949, c. 1099.)

Cross Reference.—As to trial in Lenoir criminal terms, see paragraph at end of County of uncontested divorce cases at Sixth District.

Duplin—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; fifth Monday before the first Monday in March, to continue for one week for the trial of criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; fifth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; first Monday before the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; fifth Monday after the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal cases, or civil cases, or both, and the second week for the trial of civil cases exclusively; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only.

At all criminal terms of the superior court in the county of Duplin, uncontested divorce cases may be tried and the court may hear and determine all motions in civil matters, not requiring a jury trial and make any order, judgment or decree respecting the confirmation of judicial sales. (1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240; C. S., s. 1443; Ex. Sess. 1920, c. 81; Ex. Sess. 1921, cc. 78, 79; 1931, c. 271; 1933, c. 234, s. 1; 1935, cc. 157, 289; 1941, c. 321; 1947, c. 909; 1951, c. 808, s. 1.)

Onslow—Second Monday in January, to continue for two weeks, for the trial of civil or criminal cases, or both; first Monday in March to continue for one week, for the trial of criminal cases, or civil cases, or both; twelfth Monday after the first Monday in March to continue for two weeks, for the trial of criminal and civil cases; seventh Monday before the first Monday in September, to continue for one week, for the trial of civil cases and jail cases, in accordance with the next succeeding paragraph; fourth Monday after the first Monday in September, to continue for one week for the trial of criminal and civil cases; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases. (1913, c. 196; Ex. Sess. 1913, c. 75; 1915, c. 240; C. S., s. 1443; Ex. Sess. 1921, c. 78, s. 1; 1927, c. 179, s. 1; 1933, c. 234, s. 1; 1941, c. 321; 1943, c. 389; 1951, c. 808, s. 2; 1951, c. 969, s. 1.)

The July term of the superior court for Onslow County, is hereby authorized, in the discretion of the board of county commissioners signified by resolution duly adopted in apt time, to try any or all State cases which involve defendants or witnesses confined in jail to await trial. In the event such trials are ordered, by such resolution, the board of county commissioners shall cause to be drawn and summoned in the usual manner sufficient jurors to provide for the empaneling of a grand jury and to also provide for a trial jury or juries. (1931, c. 341.)

Sampson—Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal or civil cases, or both; third Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively; fourteenth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only, and for this term of court a special or emergency judge shall be assigned by the Governor if the regular judge is unable for any cause set out in article four, section eleven of the Constitution to hold said term. Fourth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal or civil cases, or both; first Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; seventh Monday after the first Monday in September, to continue for two weeks, the first week of which shall be for the trial of criminal or civil cases, or both, and the second week for the trial of civil cases exclusively. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; C. S., s. 1443; Ex. Sess. 1921, c. 79, s. 2; 1927, c. 179, s. 1(b); 1933, c. 234, s. 1; 1935, c. 283; 1941, c. 351; 1941, c. 367, s. 1.)

At criminal terms of superior court in the sixth judicial district, civil actions which do not require a jury may be heard by consent; and at criminal terms in the county of Lenoir uncontested divorce cases may be tried by the court and a jury in all respects as at civil terms, and any order, judgment or decree may be entered in a civil action not requiring a jury trial. (1915, c. 240, s. 3; 1917, c. 13; C. S., s. 1443; Pub. Loc. 1925, c. 5; 1933, c. 234, s. 2; 1941, c. 367, s. 1.)

Seventh District

The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wake—Criminal courts: Eighth Monday before the first Monday in March; first Monday in March to continue for two weeks; fourth Monday after the first Monday in March; ninth Monday after the first Monday in March; thirteenth

Monday after the first Monday in March to continue for two weeks; eighth Monday before the first Monday in September; first Monday in September to continue for two weeks; fourth Monday after the first Monday in September; ninth Monday after the first Monday in September; thirteenth Monday after the first Monday in September to continue for two weeks. These terms shall be for criminal cases only, and there is scheduled a two weeks term of criminal court each for March, June, September, and December, no court for the month of August, criminal or civil, and one week of criminal court for each of the other months.

Civil courts: Seventh Monday before the first Monday in March to continue for three weeks; second Monday before the first Monday in March to continue for two weeks; second Monday after the first Monday in March to continue for two weeks; sixth Monday after the first Monday in March to continue for three weeks; tenth Monday after the first Monday in March to continue for three weeks; fifteenth Monday after the first Monday in March to continue for two weeks; second Monday after the first Monday in September to continue for two weeks; sixth Monday after the first Monday in September to continue for three weeks; tenth Monday after the first Monday in September to continue for three weeks; fifteenth Monday after the first Monday in September to continue for one week. These terms shall be for civil cases only and there shall be no term for civil cases in July or in August. (1913, c. 196; 1917, c. 116; 1919, c. 113; C. S., s. 1443; Ex. Sess. 1924, c. 77; 1937, cc. 163, 387; 1939, c. 378; 1941, c. 367, s. 1; 1943, c. 587.)

Franklin—The sixth Monday before the first Monday in March for two weeks for the trial of civil cases only; the third Monday before the first Monday in March one week for the trial of criminal cases; sixth Monday after the first Monday in March one week for the trial of criminal cases; eighth Monday after the first Monday in March two weeks for the trial of civil cases only; second Monday after the first Monday in September two weeks for the trial of civil cases only; fifth Monday after the first Monday in September one week for the trial of criminal cases; twelfth Monday after the first Monday in September two weeks for the trial of civil cases only.

The courts provided in the above paragraph shall be held by the judge regularly riding the seventh judicial district.

At all criminal terms provided for in the second preceding paragraph, all motions and divorce cases may be heard, and, by consent, jury trials in all civil cases may be heard at said criminal terms. (1913, c. 196; 1917, c. 116; C. S., s. 1443; 1937, c. 387, ss. 1, 3; 1939, c. 184; 1941, c. 189; 1943, c. 699; 1945, c. 630.)

Eighth District

The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cross Reference.—For provisions applicable to entire district, see paragraph at end of Eighth District.

New Hanover—Seventh Monday before the first Monday in March, a term of one week for the trial of criminal cases only; fourth Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; first Monday before the first Monday in March, a term of two weeks for the trial of criminal cases only; first Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; sixth Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; eleventh Monday after the first Monday in March, a term of one week for the trial of criminal cases only; twelfth Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in March, a term of one week for the trial of criminal cases only; sixth Monday

before the first Monday in September, a term of one week for the trial of criminal cases only; third Monday before the first Monday in September, a term of one week for the trial of criminal cases only; second Monday before the first Monday in September, a term of two weeks for the trial of civil cases only; fourth Monday after the first Monday in September, a term of one week for the trial of criminal cases only; fifth Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; ninth Monday after the first Monday in September, a term of two weeks for the trial of criminal cases only; thirteenth Monday after the first Monday in September, a term of two weeks for the trial of civil cases only. (1913, c. 196; 1915, c. 60; 1919, c. 167; C. S., s. 1443; 1921, c. 14; 1941, c. 367, s. 1; 1945, c. 740; 1949, c. 692; 1951, c. 722.)

Pender—Eighth Monday before the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday after the first Monday in March, a term of two weeks for the trial of civil cases only; eighth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday after the first Monday in September, a term of one week for the trial of civil and criminal cases; seventh Monday after the first Monday in September, a term of two weeks for the trial of civil cases only. (1913, c. 196; C. S., s. 1443; 1921, c. 14; 1933, c. 153; 1941, c. 367, s. 1; 1945, c. 740; 1947, c. 910, s. 2; 1951, c. 814.)

Columbus—Eighth Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; fifth Monday before the first Monday in March, a term of two weeks for the trial of criminal cases only; second Monday before the first Monday in March, a term of two weeks for the trial of civil cases only; ninth Monday after the first Monday in March, a term of one week for the trial of criminal cases only; fifteenth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; first Monday in September, a term of two weeks for the trial of criminal cases only; third Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; fifth Monday after the first Monday in September, a term of one week for the trial of criminal cases only; eighth Monday after the first Monday in September, a term of two weeks for the trial of civil cases only; eleventh Monday after the first Monday in September, a term of two weeks for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; C. S., s. 1443; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40; 1931, c. 246; 1937, c. 52; 1941, c. 367, s. 1; 1943, c. 541; 1945, c. 740; 1949, c. 474; 1951, c. 815.)

Brunswick—Sixth Monday before the first Monday in March, a term of one week for the trial of civil and criminal cases; third Monday before the first Monday in March, a term of one week for the trial of civil cases only; fifth Monday after the first Monday in March, a term of one week for the trial of civil cases only; tenth Monday after the first Monday in March, a term of one week for the trial of civil and criminal cases; second Monday after the first Monday in September, a term of one week for the trial of civil and criminal cases; fourth Monday after the first Monday in September, a term of one week for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; C. S., s. 1443; 1921, c. 14; 1941, c. 367, s. 1; 1945, c. 740; 1947, c. 910, s. 1; 1951, c. 723.)

All motions and orders, applications for injunctions, receiverships, etc., in the eighth district, may be heard at criminal terms upon five days' notice. Divorce cases may be tried at any term of court, civil or criminal. (C. S., s. 1443; 1921, c. 14.)

Ninth District

The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Bladen—Eighth Monday before the first Monday in March for the trial of civil cases, and the trial of criminal cases, where bills have been found, and cases on appeal from the recorder's court and courts of the justices of the peace; the second Monday after the first Monday in March for the trial of criminal cases

only; the eighth Monday after the first Monday in March for the trial of civil cases only; the fourth Monday before the first Monday in September for the trial of civil cases only; the second Monday after the first Monday in September for the trial of criminal cases only. Said courts to continue for one week unless the business is sooner disposed of, and grand juries to be summoned only for the March and September terms of court: Provided, that if the necessity should arise, and the county commissioners of Bladen County should so determine and order, a grand jury may be summoned by said commissioners for the January terms of court; and such grand jury so summoned shall have, perform and exercise all of the powers and duties of regular grand juries herein provided for the March and September terms of court. At any term for the trial of criminal cases, civil cases may be tried by consent. (1913, c. 196; 1915, c. 110; C. S., s. 1443; 1925, c. 64; 1927, c. 166, s. 1; 1929, c. 27, s. 1; 1931, c. 96; 1933, c. 77; Pub. Loc. 1935, c. 101, s. 3; 1937, c. 159.)

If it shall appear to the board of county commissioners of Bladen County at any time before the jury is summoned for a term of superior court of Bladen County that there is not sufficient business to justify a term of such court or that there are no cases of sufficient importance to warrant the expense of a term of such court, the said board of commissioners are authorized to order that the jury for such term be not summoned, and all cases which would come on for trial at such term shall be continued. In case of the continuance of a term of superior court of Bladen County as herein provided the board of commissioners of Bladen County shall notify, or cause to be notified, the solicitor of the district, the judge holding the courts of the district and the court stenographer of their action. (1933, c. 119.)

Cumberland—Seventh Monday before the first Monday in March; first Monday in March; the first Monday after the first Monday in March; the eighth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; first Monday before the first Monday in September; fifth Monday after the first Monday in September; and the eleventh Monday after the first Monday in September, the last for two weeks; each for criminal cases only. If the regular judge is unable for any reason set forth in article four, section eleven of the Constitution to hold the terms above provided for beginning on the first Monday in March, the eighth Monday after the first Monday in March, and the fifth Monday after the first Monday in September, the Governor shall assign a special, emergency or other regular judge to hold said terms. Third Monday before the first Monday in March; third Monday after the first Monday in March; ninth Monday after the first Monday in March; third Monday after the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. At all criminal terms of court civil cases may be heard by consent of the parties, and motions may be heard upon ten days' notice to the adverse party prior to said term. (1913, c. 196; Ex. Sess. 1913, c. 23; C. S., s. 1443; 1931, c. 96; 1937, c. 159; 1941, c. 367, s. 1.)

Hoke—Sixth Monday before the first Monday in March; seventh Monday after the first Monday in March; second Monday before the first Monday in September, to continue for one week; tenth Monday after the first Monday in September. The commissioners of Hoke County, whenever in their discretion the best interests of the county demand it, shall have and are hereby granted the power and authority, by order, to abrogate, in any year, the holding of any one of the above set forth terms of court, and when said term is so abrogated, thirty days' notice of the same shall be given by said commissioners by the publication of same in a newspaper published in said county and at the courthouse door: Provided, that in the event the regular term at which the grand jury is selected shall be the term abrogated then the grand jury shall continue to serve until the following term of court at which time a new grand jury shall be selected.

(1913, c. 196; 1917, c. 233; C. S., s. 1443; Ex. Sess. 1921, c. 81; 1927, c. 155; 1931, c. 96; 1933, c. 333; 1939, c. 108; 1951, c. 959, s. 1.)

Robeson—Fifth Monday before the first Monday in March two weeks for the trial of criminal cases; first Monday before the first Monday in March two weeks for the trial of civil cases; fifth Monday after the first Monday in March two weeks for the trial of criminal cases; eleventh Monday after the first Monday in March two weeks for the trial of civil cases; fourteenth Monday after the first Monday in March one week for the trial of civil cases; fifteenth Monday after the first Monday in March one week for the trial of criminal cases; eighth Monday before the first Monday in September two weeks for the trial of civil cases; third Monday before the first Monday in September one week for the trial of criminal cases; first Monday in September two weeks for the trial of criminal cases; fifth Monday after the first Monday in September two weeks for the trial of civil cases; ninth Monday after the first Monday in September one week for the trial of criminal cases; thirteenth Monday after the first Monday in September two weeks for the trial of civil cases; fifteenth Monday after the first Monday in September one week for the trial of criminal cases.

There shall also be held in Robeson County superior courts, to which judges shall be assigned, the following terms: Second Monday after the first Monday in March one week for the trial of criminal cases; ninth Monday after the first Monday in March two weeks for the trial of criminal cases; third Monday after the first Monday in September one week for the trial of criminal cases; seventh Monday after the first Monday in September one week for the trial of criminal cases.

At all criminal terms all motions and divorce cases may be heard and jury trials in all civil cases may be heard by consent. The commissioners of Robeson County, by and with the consent and approval of the solicitor of the ninth judicial district, in writing, may call off any term of superior court in said county scheduled above for the trial of criminal cases to which the judge must be assigned. The grand jury shall convene at all criminal terms of said courts unless the solicitor of the ninth judicial district shall, prior to the said court, notify the sheriff of Robeson County not to assemble the grand jury for said term, and such notice, in writing, shall be filed with the clerk of the board of commissioners of said county, and shall be spread upon the minutes of the board of commissioners thereof. (1913, c. 196; 1915, c. 208; 1919, c. 105; C. S., s. 1443; 1923, c. 209; Pub. Loc. 1925, cc. 12, 22, 519; 1927, c. 84; 1931, c. 96; 1935, c. 132; 1937, c. 167; 1939, c. 171, s. 2.)

In addition there shall also be held in Robeson County, superior courts to which judges shall be assigned, the following terms:

Seventh Monday before the first Monday in March two weeks for the trial of civil cases; seventh Monday after the first Monday in March one week for the trial of civil cases; first Monday before the first Monday in September one week for the trial of civil cases; tenth Monday after the first Monday in September one week for the trial of civil cases. (1939, c. 171, s. 1.)

Tenth District

The tenth district shall be composed of the following counties, and the superior courts thereof shall be held in each year at the following times, to-wit:

Alamance—Fourth Monday before first Monday in March, sixth Monday after first Monday in March, fourteenth Monday after first Monday in March, third Monday before first Monday in September, sixth Monday after first Monday in September, seventh Monday after first Monday in September and twelfth Monday after first Monday in September, all for the trial of criminal cases.

Seventh Monday before first Monday in March, sixth Monday before first Monday in March, third Monday after first Monday in March, fourth Monday after first Monday in March, eleventh Monday after first Monday in March, twelfth Monday after first Monday in March, first Monday in September, first Monday after first Monday in September, ninth Monday after first Monday in September

and tenth Monday after first Monday in September, all for the trial of civil cases.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms, and a special judge may be named to hold said terms of the superior court of Alamance County when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; 1915, c. 53; C. S., s. 1443; 1921, c. 134; Ex. Sess. 1921, c. 36; 1929, c. 172; 1931, c. 228; 1951, c. 756.)

Durham—Eighth Monday before the first Monday in March, for one week, for the trial of criminal cases only; seventh Monday before the first Monday in March, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases, or both; third Monday before the first Monday in March, for one week, for the trial of criminal cases; second Monday before the first Monday in March, for one week, for the trial of criminal cases only; first Monday before the first Monday in March, to continue for four weeks, the first three weeks to be for the trial of civil cases only, and the fourth week to be for the trial of civil or criminal cases or both; third Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only; fifth Monday after the first Monday in March, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases, or both; eighth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; tenth Monday after the first Monday in March, for one week, for the trial of criminal cases; eleventh Monday after the first Monday in March, for one week, for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases or both; fifteenth Monday after the first Monday in March, for one week, for the trial of criminal cases; sixteenth Monday after the first Monday in March, for one week, for the trial of criminal cases only; seventh Monday before the first Monday in September, for one week, for the trial of criminal cases only; fifth Monday before the first Monday in September, to continue for two weeks, for the trial of civil or criminal cases, or both; first Monday before the first Monday in September, for one week, for the trial of criminal cases; first Monday in September, to continue for two weeks, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for three weeks, the first two weeks to be for the trial of civil cases only, and the third week to be for the trial of civil or criminal cases, or both; fifth Monday after the first Monday in September, for one week, for the trial of criminal cases only; sixth Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, the first week to be for the trial of civil cases only, and the second week to be for the trial of civil or criminal cases or both; twelfth Monday after the first Monday in September, for one week, for the trial of criminal cases; thirteenth Monday after the first Monday in September, for one week, for the trial of criminal cases only; fourteenth Monday after the first Monday in September, for one week, for the trial of criminal cases.

In case of conflict of any of the regularly established terms of the courts of the tenth judicial district with the terms above set out, the said terms of court here established shall be considered special terms, and the Chief Justice of the Supreme Court shall assign a regular, special or emergency judge to hold each said special term. (1913, c. 196; 1915, c. 68; C. S., s. 1443; Ex. Sess. 1921, c. 36; Ex. Sess. 1924, c. 39; 1929, c. 243; 1931, cc. 224, 419; 1941, c. 274; 1941, c. 367, s. 1; 1951, c. 1180, s. 1.)

Granville—Fourth Monday before the first Monday in March, fifth Monday after the first Monday in March, tenth Monday after the first Monday in Sep-

tember, each term for two weeks; sixth Monday before the first Monday in September, one week; seventh Monday after the first Monday in September, one week, for civil cases only. (1913, c. 196; 1915, c. 7; C. S., s. 1443; Ex. Sess. 1921, c. 36; 1923, c. 131.)

Orange—Tenth Monday after the first Monday in March, fifteenth Monday after the first Monday in March, fourth Monday after the first Monday in September, for civil cases only; second Monday after the first Monday in March, first Monday before the first Monday in September, fourteenth Monday after the first Monday in September.

The fourteenth Monday after the first Monday in March, to continue for one week, for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The second Monday before the first Monday in September to continue for one week for the trial of criminal and civil cases and is hereby constituted a mixed term of court;

The first Monday before the first Monday in September to continue for one week for the trial of civil cases only.

For each separate week of court there shall be separate jurors summoned. If the judge regularly assigned to the district in which said county is situated is unable, because of another regular term of court in the said district, or for other causes, to hold any term of court provided for in the three preceding paragraphs, then the Governor shall assign another judge to hold said term. (1913, c. 196; 1915, cc. 33, 54; 1917, c. 52; C. S., s. 1443; Ex. Sess. 1921, c. 36; 1927, c. 205; 1929, c. 172, s. 2.)

Person—Fifth Monday before the first Monday in March; fourth Monday before the first Monday in March; seventh Monday after the first Monday in March; first Monday before the first Monday in September; sixth Monday after the first Monday in September. All of said terms shall be for the trial of criminal and civil cases, except the term beginning on the fourth Monday before the first Monday in March, which shall be for the trial of civil cases only. (1913, c. 196; 1915, c. 54; C. S., s. 1443; Ex. Sess. 1921, c. 36; 1929, c. 23; 1941, c. 367, s. 1; 1951, c. 437.)

Western Division

Eleventh District

The eleventh district will be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Alleghany—Fifth Monday before the first Monday in March; eighth Monday after the first Monday in March; third Monday before the first Monday in September; fourth Monday after the first Monday in September. All terms to be held by the regular judge, and to be for the trial of civil and criminal cases. (1913, c. 196; C. S., s. 1443; 1935, c. 246; 1937, c. 413, s. 4; 1941, c. 367, s. 1; 1949, c. 456.)

Ashe—Sixth Monday after the first Monday in March, and seventh Monday after the first Monday in September (both by regular judge), for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; sixth Monday before the first Monday in September, to continue for two weeks, for the trial of civil cases only (regular judge): Provided, that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 34; C. S., s. 1443; Ex. Sess. 1921, c. 32; 1935, c. 246; 1937, c. 413, s. 4.)

Forsyth—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; seventh Monday before the first Monday in March, to continue for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second two weeks to be presided over by a regular judge to be assigned; fourth Monday be-

fore the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; third Monday before the first Monday in March for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second two weeks to be presided over by a regular judge to be assigned; first Monday in March, to continue for two weeks, for trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday after the first Monday in March for three weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned, and the last two weeks to be presided over by a regular judge to be assigned; fourth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; sixth Monday after the first Monday in March, to continue for three weeks, the first week of said term to be presided over by a special judge to be assigned, the second week to be presided over by a regular judge to be assigned and the third week to be presided over by a special judge to be assigned; tenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; twelfth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only, to be presided over by a special judge to be assigned; fourteenth Monday after the first Monday in March, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; fifteenth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only, to be presided over by a special judge to be assigned; ninth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; second Monday after the first Monday in September, to continue for three weeks, for the trial of civil cases only, the first two weeks of said term to be presided over by a regular judge to be assigned and the last week to be presided over by a special judge to be assigned; fifth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, the first week of said term to be presided over by a special judge to be assigned and the second week to be presided over by a regular judge to be assigned; tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only, to be presided over by a regular judge to be assigned; eleventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only, to be presided over by a regular judge to be assigned; thirteenth Monday after the first Monday in September, to continue for two weeks, for the trial of criminal cases only, to be presided over by a regular judge to be assigned.

The Governor shall assign a special, emergency or any regular judge to hold the courts hereinbefore provided for when the regular judge assigned to the district is unable to hold same for any cause set out in article IV, section eleven of the Constitution.

In the terms of court herein designated as criminal terms, motions in civil actions may be heard upon due notice; trials in civil actions may be heard by consent of the parties, and uncontested divorce actions may be tried. At such criminal terms motions for confirmation or rejection of referee's reports may be heard upon ten days' notice and judgment entered on said reports. (1913, c. 196; 1917, c. 169; Pub. Loc. 1917, c. 375; 1919, c. 87; C. S., s. 1443; 1923, c. 151; Pub. Loc. 1925, c. 19; 1927, c. 197; 1929, c. 131; 1933, cc. 231, 306; 1935, c. 246; 1937, c. 158; 1937, c. 413, ss. 4, 5; 1941, c. 367, s. 1; 1945, c. 166.)

Twelfth District

The twelfth district is composed of Guilford County and Davidson County.

Guilford—The superior court of Guilford County is composed of two divisions, the Greensboro division and the High Point division; and the superior court thereof shall be opened and held at the following times and places, to-wit:

In the Greensboro division at the county courthouse in Greensboro, for the trial of criminal cases only.

Eighth Monday before the first Monday in March, one week (R);
 Fourth Monday before the first Monday in March, two weeks (R);
 First Monday in March, one week (A);
 Second Monday after the first Monday in March, two weeks (R);
 Seventh Monday after the first Monday in March, one week (A);
 Tenth Monday after the first Monday in March, two weeks (A);
 Fourteenth Monday after the first Monday in March, two weeks (A);
 Eighth Monday before the first Monday in September, one week (R);
 Sixth Monday before the first Monday in September, two weeks (R);
 First Monday before the first Monday in September, one week (R);
 First Monday after the first Monday in September, two weeks (A);
 Fifth Monday after the first Monday in September, two weeks (A);
 Ninth Monday after the first Monday in September, two weeks (R);
 Thirteenth Monday after the first Monday in September, one week (A);
 Fifteenth Monday after the first Monday in September, one week (R);

In the High Point division at the county building in High Point for the trial of criminal cases only:

Seventh Monday before the first Monday in March, two weeks (A);
 Second Monday before the first Monday in March, two weeks (A);
 First Monday after the first Monday in March, one week (A);
 Fourth Monday after the first Monday in March, two weeks (R);
 Eighth Monday after the first Monday in March, one week (R);
 Twelfth Monday after the first Monday in March, one week (R);
 Seventh Monday before the first Monday in September, one week (R);
 Third Monday after the first Monday in September, two weeks (A);
 Seventh Monday after the first Monday in September, two weeks (R);
 Fourteenth Monday after the first Monday in September, one week (R);

In the Greensboro division at the county courthouse in Greensboro for the trial of civil cases only:

Eighth Monday before the first Monday in March, three weeks (1st week—A) (2nd & 3rd—R);

Fourth Monday before the first Monday in March, two weeks (A);
 First Monday in March, two weeks (R);
 Fourth Monday after the first Monday in March, two weeks (A);
 Sixth Monday after the first Monday in March, two weeks (R);
 Eighth Monday after the first Monday in March, two weeks (A);
 Thirteenth Monday after the first Monday in March, three weeks (R);
 Eighth Monday before the first Monday in September, two weeks (A);
 First Monday after the first Monday in September, two weeks (A);
 Third Monday after the first Monday in September, two weeks (R);
 Fifth Monday after the first Monday in September, two weeks (R);
 Seventh Monday after the first Monday in September, two weeks (A);
 Eleventh Monday after the first Monday in September, two weeks (R);

In the High Point division at the county building in High Point, for the trial of civil cases only:

Fifth Monday before the first Monday in March, one week (A);
 Second Monday after the first Monday in March, two weeks (A);
 Tenth Monday after the first Monday in March, two weeks (R);
 Sixteenth Monday after the first Monday in March, one week (A);
 Fifth Monday before the first Monday in September, one week (A);

Ninth Monday after the first Monday in September, two weeks (A);

Thirteenth Monday after the first Monday in September, one week (R);

The regular judge holding the courts of the twelfth judicial district shall hold all terms in the foregoing schedule designated (R), and the Chief Justice of the Supreme Court shall assign a special, emergency, or any regular judge to hold all terms in the foregoing schedule designated (A), in both the Greensboro division and the High Point division. And if for any reason the judge holding the courts of the twelfth judicial district is unable to hold any of said terms, the Chief Justice of the Supreme Court shall assign a special, emergency, or any regular judge to hold said terms.

Any of the terms of court assigned or provided as above set out to be held in either the Greensboro division or the High Point division of the superior court of Guilford County may be transferred to, and held in, the other division of the said superior court of Guilford County by order of the resident judge of the twelfth judicial district, or the judge regularly assigned to hold the courts of the twelfth judicial district, upon publication of notice in a daily newspaper published in Greensboro and a daily newspaper published in High Point ten days prior to the term.

Defendants bound and witnesses recognized to appear at a term of the superior court which is ordered transferred and held in the other division, shall make their appearance at the next succeeding criminal term of the superior court held in the division to which they were originally bound or recognized. This statute shall in no wise affect the right provided for change of venue.

Davidson—In Davidson County at the courthouse in Lexington for the trial of civil and criminal cases:

Fifth Monday before the first Monday in March, one week (R);

Ninth Monday after the first Monday in March, one week (R);

Sixteenth Monday after the first Monday in March, one week (R);

Second Monday before the first Monday in September, one week (R);

Eleventh Monday after the first Monday in September, two weeks (A);

In Davidson County at the courthouse in Lexington for the trial of civil cases only:

Second Monday before the first Monday in March, two weeks (R);

Fifth Monday after the first Monday in March, two weeks (A);

Twelfth Monday after the first Monday in March, two weeks (A);

First Monday after the first Monday in September, two weeks (R);

Fourth Monday after the first Monday in September, two weeks (A);

The regular judge holding the courts of the twelfth judicial district shall hold all terms in the foregoing schedule designated (R), and the Chief Justice of the Supreme Court shall assign a special, emergency or any regular judge to hold all terms in the foregoing schedule designated (A). And if for any reason the judge holding the courts in the twelfth judicial district is unable to hold any of said terms, the Chief Justice of the Supreme Court shall assign a special, emergency, or any regular judge to hold said term. (1913, c. 196; Ex. Sess. 1913, c. 14; C. S., s. 1443; 1921, cc. 22, 42; 1923, c. 169; 1927, c. 211; 1931, c. 114; 1933, cc. 14, 404; 1935, c. 184; 1939, c. 42; 1941, c. 367, s. 1; 1943, c. 682; 1945, c. 654; 1947, c. 1050; 1951, c. 994, s. 1.)

Thirteenth District

The thirteenth district shall be composed of the following counties, and the superior courts shall be held at the following times, to-wit:

Union—Second Monday before the first Monday in March to continue for two weeks for the trial of civil and criminal cases; ninth Monday after the first Monday in March for the trial of civil and criminal cases; second Monday before the first Monday in September to continue for two weeks and for the trial of civil and criminal cases; sixth Monday after the first Monday in September to continue for two weeks and for the trial of civil and criminal cases.

If it shall appear to the board of county commissioners of Union County thirty days prior to the convening of either of said terms hereinabove provided for that the condition of the criminal docket does not justify the assembling of the grand jury for such term, then the board of county commissioners may in their discretion direct the clerk of superior court of said county to notify such grand jurors and the solicitor of said district of such fact and that they need not appear at said term.

If it shall appear to the board of commissioners of Union County thirty days prior to the convening of either of said terms hereinabove provided for that the civil or criminal docket, or both, do not justify the holding of such term, or the second week thereof, in the event such term be a two-weeks term, then the board of county commissioners in their discretion, and upon the recommendation of the Union County Bar Association, may notify the clerk of the superior court that said term or the second week thereof, has been dispensed with, and the clerk of said court shall not make a calendar of cases to be tried at such term, or second week thereof, as the case may be, and the judge assigned to hold the courts for said district shall be notified forthwith by said clerk that such term will not be held. (1913, c. 196; Ex. Sess. 1913, c. 22; 1915, c. 72; 1917, cc. 28, 117; C. S., s. 1443; 1921, c. 55; 1933, c. 112; 1939, c. 25; 1943, c. 654.)

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March for civil cases only; sixth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; C. S., s. 1443; Ex. Sess. 1921, c. 16; 1923, c. 112; 1927, c. 181; 1929, c. 157.)

Scotland—First Monday after the first Monday in March for one week, for the trial of criminal and civil cases; eighth Monday after the first Monday in March for one week, for the trial of civil cases only; fourth Monday before the first Monday in September for one week, for the trial of criminal and civil cases; eighth Monday after the first Monday in September for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September for two weeks, for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 22; 1917, c. 105; C. S., s. 1443; 1923, c. 178; 1933, c. 116; 1937, c. 371.)

Moore County—Sixth Monday before the first Monday in March, for the trial of criminal cases only, to continue for one week; third Monday before the first Monday in March, for the trial of civil cases only, to continue for one week; third Monday after the first Monday in March, for the trial of civil cases only, to continue for one week; eleventh Monday after the first Monday in March, to continue for two weeks, the first week for the trial of criminal cases only and the second week for the trial of civil cases only; third Monday before the first Monday in September, to continue for one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only; the first Monday in November, for the trial of civil cases only, to continue for one week.

Each of the terms designated for the trial of criminal cases shall also have jurisdiction to hear motions in civil actions on notice; and civil cases requiring a jury may, by consent of parties thereto, be tried at such terms. Uncontested divorce cases may be tried at any criminal term of superior court by permission of the presiding judge. (1913, c. 196; Ex. Sess. 1913, c. 30; 1915, c. 64; C. S., s. 1443; 1929, c. 229; 1943, c. 629; 1949, c. 454; 1951, c. 75.)

Richmond—Eighth Monday before the first Monday in March to continue for one week; fifth Monday after the first Monday in March to continue for one week; sixth Monday before the first Monday in September to continue for one week; fourth Monday after the first Monday in September to continue for one week, all for the trial of criminal cases; fourth Monday before the first Monday in

March to continue for one week; second Monday after the first Monday in March to continue for one week; twelfth Monday after the first Monday in March to continue for one week; fifteenth Monday after the first Monday in March to continue for two weeks; seventh Monday before the first Monday in September to continue for one week; first Monday in September to continue for one week; ninth Monday after the first Monday in September to continue for one week, all for the trial of civil cases.

Each of the terms designated for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term, and for the hearing of motions in civil actions; and civil cases requiring a jury, may, by consent of the parties thereto, be tried at such criminal terms.

The Governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Richmond County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; 1915, c. 72; 1917, c. 117; 1919, c. 98; C. S., s. 1443; 1921, c. 77; Ex. Sess. 1921, c. 16; 1923, cc. 112, 184; 1925, c. 241; 1931, c. 82; 1935, c. 3; 1951, c. 791.)

Stanly—Fourth Monday before the first Monday in March to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March; tenth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; first Monday in September to continue for two weeks, for civil cases only; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September.

Each of the terms set for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term; and for the hearing of motions in civil actions; and for the trial of civil cases requiring a jury where issues are drawn by consent of the parties thereto; and for the trial of actions for divorce and other actions in which no answer has been filed when the time for filing the answer has expired.

The Governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for Stanly County when the judge regularly holding the courts in said district for any cause is unable to hold any of said terms. (1913, c. 196; C. S., s. 1443; 1933, c. 240.)

Fourteenth District

The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Gaston—Seventh Monday before the first Monday in March; first Monday after the first Monday in March; seventh Monday after the first Monday in March; thirteenth Monday after the first Monday in March; sixth Monday before the first Monday in September; first Monday after the first Monday in September; seventh Monday after the first Monday in September; twelfth Monday after the first Monday in September, each to continue for one week, for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; eleventh Monday after the first Monday in March; fifth Monday before the first Monday in September; second Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each to continue for two weeks, for the trial of civil cases exclusively; eighth Monday after the first Monday in September to continue for one week for the trial of civil cases only: Provided, that when the judge regularly assigned to hold the courts of the district is unable to do so for any cause set out in article four, section eleven, of the Constitution, a special or emergency judge shall be assigned by the Governor to hold said courts in Gaston County, and such special or emergency judge shall have all the powers conferred upon any resident or presiding judge.

At all criminal terms of said court, civil trials which do not require a jury may

be heard by consent of the parties; and at all criminal terms of said court, upon five days' notice to the adverse party, any order, application for injunction, receivership, motions, etc., may be heard in same manner as at civil terms. (1913, c. 196; Ex. Sess. 1913, c. 12; 1915, c. 153; 1919, c. 187; C. S., s. 1443; Ex. Sess. 1920, c. 39; 1925, c. 237; 1931, c. 242; 1941, c. 367, s. 1.)

Mecklenburg—Eighth Monday before the first Monday in March; first Monday before the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; eighth Monday before the first Monday in September, which last named term only is to continue two weeks; first Monday before the first Monday in September; fourth Monday after the first Monday in September; tenth Monday after the first Monday in September, which eight terms are for the trial of criminal cases exclusively; fourth Monday before the first Monday in March, to continue three weeks; the first Monday in March; fourth Monday after the first Monday in March; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March; the first Monday in September; fifth Monday after the first Monday in September; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, which last named eight terms are to continue for two weeks; fifteenth Monday after the first Monday in March, and all of the last named ten terms are for the trial of civil cases exclusively: Provided, that the board of county commissioners of Mecklenburg County may in their discretion, by an order at their regular meeting held on the first Monday in March in any year, provide for the holding of a term of court for the seventh Monday after the first Monday in March, and for the trial of civil and criminal cases, either or both, at said term.

No process nor other writ of any kind pertaining to civil actions shall be made returnable to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Mecklenburg County.

In addition to the courts above set out for Mecklenburg County, the following terms of superior court for the trial of civil cases in Mecklenburg County shall be held, as follows: eighth Monday before the first Monday in March; sixth Monday before the first Monday in March; fourth Monday before the first Monday in March; second Monday before the first Monday in March; first Monday in March; second Monday after the first Monday in March; fourth Monday after the first Monday in March; sixth Monday after the first Monday in March; eighth Monday after the first Monday in March; tenth Monday after the first Monday in March; twelfth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; the first Monday in September; the second Monday after the first Monday in September; the fourth Monday after the first Monday in September; the sixth Monday after the first Monday in September; the eighth Monday after the first Monday in September; the tenth Monday after the first Monday in September; the twelfth Monday after the first Monday in September; and the fourteenth Monday after the first Monday in September. Said terms of court may be held contemporaneously with other courts in said county or district, shall be for two weeks each, shall be for the trial of civil cases only, and shall be held by regular, special, or emergency judges who shall be assigned by the Governor, and the special or emergency judges who preside over said additional terms of court shall have all the powers conferred upon any resident or regular judge.

In addition to the courts above set out for Mecklenburg County, the following terms of superior court for the trial of criminal cases in Mecklenburg County shall be held, as follows: sixth Monday after the first Monday in March; fifth Monday before the first Monday in September; fourth Monday before the first Monday in September, each to continue for one week. The sixth Monday before the first Monday in March; the second Monday after the first Monday in March; the sixteenth Monday after the first Monday in March; the third Monday before the first Monday in September; the second Monday after the first Monday in

September; and the thirteenth Monday after the first Monday in September. Said terms of court may be held contemporaneously with other courts in said county or district, shall be for two weeks each, shall be for the trial of criminal cases only, and shall be held by regular, special, or emergency judges who shall be assigned by the Governor, and the special or emergency judges who preside over said additional terms of court shall have all the powers conferred upon any resident or regular judge. (1913, c. 196; Ex. Sess. 1913, cc. 11, 18; 1915, c. 153; 1919, c. 187; C. S., s. 1443; Ex. Sess. 1920, c. 39; 1935, c. 48; 1937, c. 27; 1939, c. 9; 1941, c. 367, s. 1.)

Fifteenth District

The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Iredell—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday after the first Monday in March, to continue for one week, for civil cases only; eleventh Monday after the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; fifth Monday before the first Monday in September, to continue for two weeks, for criminal and civil cases; ninth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. (1913, c. 196; C. S., s. 1443; 1921, c. 121, s. 2; 1923, c. 129.)

Randolph—Second Monday after the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March, for criminal cases; seventh Monday before the first Monday in September, to continue for two weeks for civil cases only; the first Monday in September for criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. In addition to the regular terms of superior court now provided for by law for Randolph County there shall be held in Randolph County three additional terms of superior court as follows, to-wit: On the fifth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases only. On the sixteenth Monday after the first Monday in March for a term of one week, for the trial of criminal cases only. On the seventh Monday after the first Monday in September, to continue for two weeks, for the trial of civil cases only. This paragraph shall not be construed to repeal or abolish any terms now provided for the fifteenth judicial district, but in case of conflict of any of the regularly established terms of court of the fifteenth judicial district with the terms created in this paragraph, the said terms of court hereby and herein established shall be considered special terms, and the Governor may assign the judge to hold said terms of superior court for Randolph County, when the judge holding the regular terms of court in the district is unable to hold said terms. (1913, c. 196; Ex. Sess. 1913, c. 31; C. S., s. 1443; 1921, c. 121, s. 3; Ex. Sess. 1921, c. 22; 1923, c. 229; Ex. Sess. 1924, c. 23; 1925, c. 156; Pub. Loc. 1939, c. 78.)

Rowan—Third Monday before the first Monday in March, to continue for two weeks; first Monday in March, to continue for one week, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 5; C. S., s. 1443; 1921, c. 31.)

In addition to the regular terms of court now prescribed by law for Rowan County, there shall be held in Rowan County two additional terms of the superior court as follows, to-wit: On the sixth Monday after the first Monday in September to continue for one week for the trial of civil cases only; on the first Monday after the first Monday in March to continue for one week for the trial of civil cases only. This paragraph shall not be construed to repeal or abolish any terms of court now provided for the fifteenth judicial district, but in case of con-

flict of any of the regularly established terms of the courts of the fifteenth judicial district with the terms above set out, the said terms of court herein established shall be considered special terms and the Governor may assign a special or emergency judge to hold said terms of superior court of Rowan County when the judge holding the regular terms of court in the district is unable to hold said terms. (1933, c. 274.)

Cabarrus—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for one week, for civil cases only; first Monday in March, to continue for one week, for civil cases only; seventh Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; fourteenth Monday after the first Monday in March, to continue for two weeks, for civil cases only; second Monday before the first Monday in September, to continue for one week, for criminal cases only; first Monday before the first Monday in September, to continue for one week, for civil cases only; sixth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases; tenth Monday after the first Monday in September, to continue for one week, for civil cases only; thirteenth Monday after the first Monday in September, to continue for one week, for civil cases only.

The Governor shall assign an emergency or any other judge to hold any of the terms of the superior court of Cabarrus County when the judge holding courts in said district is unable to hold said terms. (1913, c. 196; C. S., s. 1443; 1921, c. 121, s. 2; 1933, c. 76; 1935, c. 177; 1939, c. 377; 1951, c. 186.)

Montgomery—Sixth Monday before the first Monday in March for criminal cases: Provided, motions on the civil docket may be heard at said term, and uncontested divorce cases and, with the consent of the parties thereto, any other civil case requiring a jury may also be tried at said term. Fifth Monday after the first Monday in March, to continue for two weeks, for civil cases only. Eighth Monday before the first Monday in September; third Monday after the first Monday in September, and eighth Monday after the first Monday in September for civil cases; fourth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 183; 1917, c. 122; C. S., s. 1443; 1921, c. 121, s. 3; 1927, c. 193, s. 1; 1941, c. 98.)

Alexander—First Monday in February, to continue for two weeks, for the trial of civil and criminal cases; second Monday in April, to continue for one week, for the trial of civil and criminal cases; fourth Monday in September, to continue for two weeks, for the trial of civil and criminal cases. For these terms of court, the Chief Justice may assign a judge to hold the same from among the regular, special, or emergency judges. (1913, c. 196; C. S., s. 1443; 1921, c. 166; 1933, c. 250, s. 4; 1935, cc. 101, 252, s. 2; 1937, c. 214; 1949, c. 458; 1951, cc. 416, 1185.)

Sixteenth District

The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cleveland—First Monday in February for two weeks for the trial of civil cases only. Third Monday after the first Monday in March for two weeks; eleventh Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; sixth Monday before the first Monday in September for two weeks; first Monday after the first Monday in September to continue for one week for the trial of civil cases only; second Monday after the first Monday in September, one week, for the trial of civil cases only; eighth Monday after the first Monday in September for two weeks; eighth Monday before the first Monday in March, for one week.

For the terms commencing on the eleventh Monday after the first Monday in March, and on the first Monday after the first Monday in September, the Governor may assign a judge to hold such terms from among the regular, special

or emergency judges. (1913, c. 196; 1915, c. 173; 1917, c. 245; C. S., s. 1443; 1927, c. 154; 1931, cc. 240, 456; 1935, cc. 194, 195; 1951, c. 56.)

Lincoln—Sixth Monday before the first Monday in March to continue for two weeks, the second week for civil cases only; eighth Monday after the first Monday in March, to continue for one week; for the trial of both criminal and civil cases; sixth Monday after the first Monday in September, to continue for two weeks, the second week for the trial of civil cases only. (1913, c. 196; 1915, c. 210; C. S., s. 1443; 1925, c. 26; 1951, c. 101, s. 1.)

Burke—Second Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; first Monday after the first Monday in March, to continue for two weeks, for the trial of civil and criminal cases; thirteenth Monday after the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; fourth Monday before the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases; third Monday after the first Monday in September, to continue for three weeks, for the trial of civil and criminal cases; fourteenth Monday after the first Monday in September, to continue for two weeks, for the trial of civil and criminal cases: Provided, however, that the board of commissioners of Burke County, in any year, upon written petition of a majority of the practicing attorneys resident in said county, may, by resolution duly adopted, dispense with and abrogate the holding of that term of said court which by the provisions of this section commences on the thirteenth Monday after the first Monday in March. (1913, c. 196; 1915, c. 67; C. S., s. 1443; Ex. Sess. 1920, c. 5; Ex. Sess. 1921, c. 90, s. 3; Pub. Loc. 1925, c. 306; 1931, c. 343; 1947, c. 26.)

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks for the trial of civil and criminal cases; eleventh Monday after the first Monday in March, to continue two weeks, for the trial of civil and criminal cases; twelfth Monday after the first Monday in September, to continue two weeks, for the trial of civil and criminal cases; the eighth Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue two weeks, for the trial of civil cases only; fourth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; thirteenth Monday after the first Monday in March to continue two weeks, for the trial of civil cases only; first Monday in September, to continue two weeks, for the trial of civil cases only. For the last five terms provided for above, the Chief Justice of the Supreme Court may assign a regular, special, or emergency judge when the judge regularly assigned to the district is unable to hold said terms for any cause set out in article IV, section 11, of the Constitution.

If the regular judge holding the courts in the sixteenth district is not available for any cause set out in article IV, section 11, of the Constitution, to hold any of the terms of court provided for in this statute, the Chief Justice of the Supreme Court shall assign a judge to hold such term or terms from among the regular, special or emergency judges. (1913, c. 196; 1915, c. 35; C. S., s. 1443; Ex. Sess. 1921, c. 90, s. 2; 1941, c. 367, s. 1; 1949, c. 453; 1951, c. 55; 1951, c. 1200, s. 1.)

Catawba—The regular April term of the superior court of Catawba County, consisting of two weeks shall be for the trial of civil cases exclusively during the first week and shall be for the trial of both civil and criminal cases during the second week. Fifth Monday after the first Monday in March, to continue for two weeks, for the trial of both civil and criminal cases: Provided, that the board of county commissioners may by resolution, adopted not less than 30 days prior to the convening of either of the last two courts, determine that the holding of such court is not necessary and cancel the same, in which case notice of such action shall immediately be given to the Chief Justice of the Supreme Court of North Carolina to the end that the judge assigned to said court may be re-

lieved from such assignment. (1913, c. 196; Ex. Sess. 1913, c. 7; C. S., s. 1443; Ex. Sess. 1921, c. 47; Ex. Sess. 1921, c. 90, s. 1; 1923, c. 18; 1925, c. 13, ss. 1, 2; 1933, c. 311; 1949, c. 1126; 1951, c. 101, s. 2.)

Watauga—Seventh Monday after the first Monday in March; second Monday after the first Monday in September (both by regular judge), for the trial of criminal cases only; fourteenth Monday after the first Monday in March to continue for a term of two weeks, trial of civil cases only; the tenth Monday after the first Monday in September to continue for a term of two weeks, for the trial of civil cases only; provided, that motions and uncontested civil cases may be heard at either of the terms designated for the trial of criminal cases only. (1913, c. 196; C. S., s. 1443; 1921, c. 166; 1931, c. 424; 1933, c. 250, s. 2; 1935, c. 274; 1945, c. 696; 1949, c. 689.)

Seventeenth District

The seventeenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Yadkin—Eighth Monday before the first Monday in March, to continue for one week, for the trial of civil and criminal cases; fourth Monday before the first Monday in March, to continue for three weeks, for the trial of civil and criminal cases; tenth Monday after the first Monday in March, to continue for one week, for the trial of civil and criminal cases; second Monday before the first Monday in September, to continue for one week for the trial of criminal cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; eleventh Monday after the first Monday in September, to continue for one week, for the trial of civil cases only; twelfth Monday after the first Monday in September, to continue for one week, for the trial of civil and criminal cases. (1913, c. 126; C. S., s. 1443; Ex. Sess. 1920, c. 42; 1921, c. 166; 1925, c. 65; 1941, c. 367, s. 1; 1947, c. 587; 1951, c. 1215, s. 1.)

Wilkes—Seventh Monday before the first Monday in March for three weeks for the trial of civil cases only; first Monday in March for three weeks for the trial of both civil and criminal cases; eighth Monday after the first Monday in March for two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in March for two weeks for the trial of both civil and criminal cases; fifteenth Monday after the first Monday in March for two weeks for the trial of civil cases only, without the intervention of a grand jury; seventh Monday before the first Monday in September for one week for the trial of civil cases only; fourth Monday before the first Monday in September for three weeks for the trial of both civil and criminal cases; first Monday after the first Monday in September for one week for the trial of civil cases only; fourth Monday after the first Monday in September for two weeks for the trial of civil cases only; eighth Monday after the first Monday in September for two weeks for the trial of civil cases only; fourteenth Monday after the first Monday in September for two weeks for the trial of civil and criminal cases.

If, in the opinion of the board of commissioners of Wilkes County, it is not advisable or necessary to hold the term of court beginning on the fourteenth Monday after the first Monday in September, and such fact is so stated in a resolution duly adopted by a majority of said board on or before the second Monday in November next preceding the day for the convening of said term, then the said term shall not be held on the fourteenth Monday after the first Monday in September of that year. Upon the adoption of such a resolution, the clerk of the board shall immediately notify the judge, who has been assigned to hold said term, that same will not be held, and no jury for the said term shall be drawn. (1913, c. 196; 1919, c. 165; C. S., s. 1443; 1921, c. 166; 1935, c. 105, s. 1; 1935, c. 192; 1937, c. 48; 1941, c. 367, s. 1; 1947, c. 587; 1949, c. 994.)

Davie—Third Monday after the first Monday in March for the trial of both criminal and civil cases; twelfth Monday after the first Monday in March, for

the trial of civil cases only; first Monday before the first Monday in September, for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, for the trial of civil cases only. (1913, c. 196; C. S., s. 1443; 1921, cc. 31, 121, 166; 1935, c. 105, s. 2; 1947, c. 587.)

Mitchell—Fourth Monday after the first Monday in March, two weeks; sixth Monday before the first Monday in September, two weeks for civil cases only; second Monday after the first Monday in September for two weeks. (1913, c. 196; C. S., s. 1443; 1921, c. 166; Ex. Sess. 1921, c. 33; 1927, c. 168; 1929, c. 10; 1933, c. 250, s. 3; 1935, c. 1; 1941, c. 212, s. 1.)

Avery—Sixth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; ninth Monday before the first Monday in September, for two weeks, for the trial of both criminal and civil cases; sixth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 169; C. S., s. 1443; 1921, c. 166; Ex. Sess. 1921, c. 33; 1923, c. 90; 1931, c. 84; 1933, cc. 152, 250, s. 1; 1941, c. 212, s. 1; 1941, c. 367, s. 1; 1943, c. 162; 1945, c. 66.)

Eighteenth District

The eighteenth district shall be composed of the following counties and the superior courts thereof shall be held at the following times, to-wit:

Henderson—Eighth Monday before the first Monday in March to continue for two weeks for the trial of civil cases only; the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; the eighth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only, and the twelfth Monday after the first Monday in March to continue for two weeks for the trial of civil cases only; the fifth Monday after the first Monday in September to continue for two weeks for the trial of both criminal and/or civil cases or both; eleventh Monday after the first Monday in September to continue for two weeks for the trial of civil cases only. (1913, c. 196; 1917, c. 115; 1919, c. 162; C. S., s. 1443; Ex. Sess. 1921, c. 24; 1923, c. 204; 1927, c. 207, s. 1; 1933, c. 117; 1935, c. 127.)

McDowell—Seventh Monday before the first Monday in March, to continue for one week for the trial of criminal cases only; the third Monday before the first Monday in March, to continue for two weeks for the trial of civil cases only; the fourteenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; the eighth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases only; the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases.

At any criminal term of court in McDowell County civil actions which do not require a jury, motions, and uncontested divorce actions with jury trial, may be heard, tried and determined and proper judgment and orders entered therein.

In the event the county commissioners shall find that any term for the trial of civil cases is not needed they may by resolution sent to the Governor cancel the term in question.

The Governor shall assign an emergency, or any other judge, to hold any of the terms of the superior court for McDowell County when the judge regularly holding the courts in said district is, because of a conflict in the terms of court or for any other cause, unable to hold any of said terms. (1913, c. 196; C. S., s. 1443; Ex. Sess. 1921, c. 24; 1923, c. 219; 1927, c. 207, s. 1; 1935, c. 127; 1937, c. 309; 1943, c. 549.)

Polk—The fifth Monday before the first Monday in March to continue for two weeks for the trial of both criminal and civil cases; second Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; C. S., s. 1443; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1933, c. 232, s. 2; 1935, c. 127.)

Rutherford—First Monday before the first Monday in March, to continue for one week for the trial of civil cases only; sixth Monday after the first Monday

in March, to continue for two weeks for the trial of civil cases only; tenth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixteenth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases only; third Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only; ninth Monday after the first Monday in September, to continue for two weeks for the trial of both civil and criminal cases. (1913, c. 196; 1915, c. 116; C. S., s. 1443; Ex. Sess. 1921, c. 24; 1927, c. 207, s. 1; 1933, c. 232, s. 1; 1935, c. 127; 1937, c. 309.)

Transylvania—Fourth Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; sixth Monday before the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 66; C. S., s. 1443; Ex. Sess. 1920, c. 19; Ex. Sess. 1921, c. 24; 1925, c. 63; 1927, c. 207, s. 1; 1929, c. 173, s. 2; 1935, c. 127.)

Yancey—Sixth Monday before the first Monday in March, to continue for one week for the trial of civil cases only; second Monday after the first Monday in March, to continue for two weeks for the trial of both criminal and civil cases; fourth Monday before the first Monday in September, to continue for two weeks for the trial of criminal and civil cases; seventh Monday after the first Monday in September, to continue for two weeks for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 38; 1915, c. 71; C. S., s. 1443; Ex. Sess. 1920, c. 4; Ex. Sess. 1921, c. 24; 1923, c. 222; 1927, c. 207, s. 1; 1929, c. 173; 1933, c. 478; 1935, c. 127.)

In all criminal terms of court in the eighteenth judicial district, civil actions and proceedings, which do not require a jury, may be heard by consent and any order, judgment or decree therein may be entered. (1935, c. 127.)

Nineteenth District

The nineteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombe—Eighth Monday before the first Monday in March, to continue for two weeks for the trial of civil cases; sixth Monday before the first Monday in March, to continue for one week, for the trial of criminal cases; eighth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases; sixth Monday before the first Monday in September, to continue for one week for the trial of criminal cases.

Fourth Monday before the first Monday in March, to continue for two weeks, for the trial of civil cases; second Monday before the first Monday in March, to continue for one week for the trial of criminal cases; first Monday in March, to continue for two weeks for the trial of civil cases; second Monday after the first Monday in March, to continue for one week for the trial of criminal cases; fourth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases; sixth Monday after the first Monday in March, to continue for one week for the trial of criminal cases; ninth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases; eleventh Monday after the first Monday in March, to continue for one week for the trial of criminal cases; thirteenth Monday after the first Monday in March, to continue for two weeks for the trial of civil cases; fifteenth Monday after the first Monday in March, to continue for one week for the trial of criminal cases; fourth Monday before the first Monday in September, to continue for two weeks for the trial of civil cases; second Monday before the first Monday in September, to continue for one week for the trial of criminal cases; first Monday in September, to continue for two weeks for the trial of civil cases; second Monday after the first Monday in September, to continue for one week for the trial of criminal cases; fourth Monday after the first Monday in September, to continue for two

weeks for the trial of civil cases; sixth Monday after the first Monday in September, to continue for one week for the trial of criminal cases; ninth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases; eleventh Monday after the first Monday in September, to continue for one week for the trial of criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for the trial of civil cases; fifteenth Monday after the first Monday in September, to continue for one week for the trial of criminal cases. The foregoing designation of terms of court "for the trial of civil cases" or "for the trial of criminal cases" shall serve to indicate the primary function of each such term of court, and cases for hearing or trial at such term shall be calendared and jury lists drawn accordingly: Provided, at all said terms of court both civil and criminal actions may be tried.

The terms of court provided in the preceding paragraph shall be held by the judge regularly riding the nineteenth judicial district, and during said terms uncontested divorce actions and civil orders may be tried and heard by the judge assigned to hold said courts.

Seventh Monday before the first Monday in March, to continue for two weeks; fifth Monday before the first Monday in March, to continue for one week; second Monday before the first Monday in March, to continue for two weeks; second Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in March, to continue for one week; eleventh Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March, to continue for two weeks; seventh Monday before the first Monday in September, to continue for two weeks; fifth Monday before the first Monday in September, to continue for one week; second Monday before the first Monday in September, to continue for two weeks; second Monday after the first Monday in September, to continue for two weeks; sixth Monday after the first Monday in September, to continue for two weeks; eighth Monday after the first Monday in September, to continue for one week; eleventh Monday after the first Monday in September, to continue for two weeks; fifteenth Monday after the first Monday in September, to continue for two weeks.

The courts provided in the preceding paragraph shall be held by special or emergency judges to be assigned by the Governor, if the regular judge assigned is unable to hold said terms for any cause set out in article four, section eleven, of the Constitution. The board of county commissioners shall notify the jury commission at, or before, the time of drawing the jurors for these terms of court whether the same shall be for the trial of civil or criminal cases, or what portions thereof shall be for each, and the jury commission shall draw jurors accordingly. (1913, c. 196; 1915, c. 117; 1917, c. 79; C. S., s. 1443; 1923, c. 31; Pub. Loc. 1925, c. 400; 1929, c. 213; 1941, c. 367, s. 1; 1951, c. 1195, s. 1.)

Madison—First Monday before the first Monday in March, to continue for one week; fourth Monday after the first Monday in March, for two weeks, for the trial of both criminal and civil cases; twelfth Monday after the first Monday in March, to continue for one week; sixteenth Monday after the first Monday in March, to continue for one week; first Monday before the first Monday in September, to continue for one week; fourth Monday after the first Monday in September, for two weeks, for the trial of both criminal and civil cases; twelfth Monday after the first Monday in September, to continue for one week.

The board of county commissioners shall, at the time of drawing the jurors for the terms of court provided in the preceding paragraph, designate whether the terms shall be for the trial of civil or criminal cases, and draw the jurors accordingly.

In addition to the terms provided for above, there shall be held in Madison County a term of the superior court to which a judge shall be assigned beginning on the fifth Monday before the first Monday in March to continue for one week, for the trial of civil cases. (1913, c. 196; 1915, c. 117; 1917, c. 79; C. S., s.

1443; 1929, c. 205; 1931, c. 25; 1941, c. 367, s. 1; 1947, c. 549, ss. 1, 2; 1949, c. 1101.)

Twentieth District

The twentieth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cherokee—Sixth Monday before the first Monday in March for civil cases only; fourth Monday after the first Monday in March; fifteenth Monday after the first Monday in March, for the trial of civil cases only: Provided, that upon request of the bar of Cherokee County the board of county commissioners need not draw a jury for this term; fourth Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue two weeks. (1913, c. 196; Ex. Sess. 1913, c. 21; 1917, c. 114; C. S., s. 1443; 1923, c. 51; 1925, c. 30.)

Graham—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; second Monday after the first Monday in March; thirteenth Monday after the first Monday in March, to be held for civil cases only; first Monday in September, each to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 28; 1917, c. 54; C. S., s. 1443; 1927, c. 245, s. 1.)

Swain—Seventh Monday before the first Monday in March, for the trial of civil cases only, to continue for two weeks; a special judge to be assigned for this court; first Monday in March; sixth Monday before the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks: Provided, that the board of commissioners of Swain County may, when the public interest requires it, decline to draw a grand jury for the July term. (1913, c. 196; C. S., s. 1443; 1933, c. 125.)

Haywood—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; eighth Monday before the first Monday in September, to continue for two weeks; second Monday after the first Monday in September, for civil cases only and the eleventh Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1917, cc. 7, 114; C. S., s. 1443; 1923, c. 35, s. 2; Ex. Sess. 1924, c. 27; 1937, c. 106.)

Jackson—Second Monday before the first Monday in March; eleventh Monday after the first Monday in March, each term to continue for two weeks and both to be for the trial of criminal and civil cases; fourteenth Monday after the first Monday in March, for the trial of civil cases only, and for this term of court the Governor shall assign a judge to hold same from among the regular, special or emergency judges; fifth Monday after the first Monday in September to continue for two weeks.

The county commissioners, may, in their judgment abrogate the term herein provided to be held on the fourteenth Monday after the first Monday in March, the jurors for this term to be drawn at the same time as those for the May term, service to be withheld pending the decision of the county commissioners. (1913, c. 196; C. S., s. 1443; 1933, c. 107; 1939, c. 212; 1947, c. 556.)

Macon—Sixth Monday after the first Monday in March; second Monday before the first Monday in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of Macon County may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this paragraph. (1913, c. 196; C. S., s. 1443; 1923, c. 35, s. 1; 1927, c. 245; 1937, c. 106.)

Clay—Eighth Monday after the first Monday in March, and fourth Monday after the first Monday in September. (1913, c. 196; C. S., s. 1443; 1927, c. 245, s. 1; 1937, c. 162; 1939, c. 44.)

Twenty-First District

There is hereby created district number twenty-one composed of the following

counties, and the superior courts thereof shall be held at the following times, to-wit:

Caswell—The second Monday after the first Monday in March, to continue for one week, for the trial of criminal cases; the fifth Monday after the first Monday in March, to continue for one week, for the trial of civil cases; the fourth Monday after the first Monday in September, to continue for one week, for the trial of civil cases; the tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases. (1913, c. 196; 1919, c. 289; C. S., s. 1443; 1927, c. 202; 1933, c. 45, s. 1; 1935, c. 246; 1937, cc. 107, 413, s. 5; 1941, c. 367, s. 1; 1945, c. 143; 1951, c. 361.)

Rockingham—First Monday after the first Monday in March to continue for one week; sixth Monday before the first Monday in March to continue for two weeks; eleventh Monday after the first Monday in March to continue for two weeks; fourth Monday before the first Monday in September to continue for two weeks; eighth Monday after the first Monday in September to continue for two weeks; fourteenth Monday after the first Monday in September to continue for one week, each of the above terms to be for the trial of criminal cases only.

First Monday in March to continue one week; sixth Monday after the first Monday in March to continue for one week; ninth Monday after the first Monday in March to continue for two weeks; fourteenth Monday after the first Monday in March to continue for two weeks; first Monday in September to continue for two weeks; seventh Monday after the first Monday in September to continue for one week; twelfth Monday after the first Monday in September to continue for two weeks, each of the above terms to be for the trial of civil cases only. Provided, that at any criminal term, either regular or special, of the superior court to be held for Rockingham County, all motions in any civil actions pending before said court, and all uncontested divorce cases pending before said court, may be heard and tried by the court, and provided further, that all other civil actions and civil matters may, with the consent of the parties and the approval of the court, be heard and tried at any criminal term, either regular or special, of the superior court of Rockingham County. However, no contested civil cases shall be tried until after the criminal docket for the term has been disposed of. (1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107; C. S., s. 1443; 1933, cc. 45, 264; 1935, c. 246; 1937, c. 156; 1937, c. 413, s. 5; 1939, c. 156; 1941, c. 58.)

Stokes—Fourth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; fifth Monday after the first Monday in March to continue for one week for the trial of civil cases only; sixteenth Monday after the first Monday in March to continue for one week for the trial of criminal cases only; second Monday before the first Monday in September to continue for one week for trial of both criminal and civil cases; fifth Monday after the first Monday in September to continue for one week for the trial of criminal cases only; sixth Monday after the first Monday in September to continue for one week, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 1; C. S., s. 1443; 1921, c. 142; 1923, c. 169; 1929, c. 158; 1937, c. 413, s. 5.)

There is hereby established a term of court to continue for one week in Stokes County, beginning the first Monday in January of each year for the trial of criminal causes only. There shall be jurors, including a grand jury, provided for said January term of court. (1939, c. 342.)

Surry—Eighth Monday before the first Monday in March to continue for one week; third Monday before the first Monday in March to continue for one week; seventh Monday after the first Monday in March to continue for one week; second Monday after the first Monday in September to continue for one week; eleventh Monday after first Monday in September to continue for one week; fifteenth Monday after the first Monday in September to continue for one week; all the above terms to be for the trial of criminal and civil cases.

Seventh Monday before the first Monday in March to continue for one week; second Monday before the first Monday in March to continue for two weeks;

eighth Monday after the first Monday in March to continue for one week; thirteenth Monday after the first Monday in March to continue for one week; eighth Monday before the first Monday in September to continue for two weeks; third Monday after the first Monday in September to continue for two weeks; all the above terms to be for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 34; C. S., s. 1443; Ex. Sess. 1921, c. 9; Pub. Loc. 1925, c. 417; 1931, c. 251; 1933, cc. 180, 413; 1935, c. 246; 1937, cc. 210, 413, s. 5; 1945, c. 174; 1951, c. 415.)

Editor's Note.—The various amendatory acts have been cited at the ends of the paragraphs affected thereby.

One 1937 amendment added the proviso and last sentence of the first paragraph of this section. Another created the twenty-first judicial district composed of the counties of Caswell, Rockingham, Surry (formerly in the Eleventh District) and Stokes (formerly in the Twelfth District, now composed of the counties of Guilford and Davidson).

For comment on Public Laws 1941, c. 367, see 19 N. C. Law Rev. 475. For comment on the 1943 amendment, see 21 N. C. Law Rev. 344.

Session Laws 1943, c. 121, provided for holding terms of the superior court in each city in the State, which is not a county seat, having as many as thirty-five thousand inhabitants according to the last federal census.

Judicial Notice of Dates of Terms.—The courts will take judicial notice of the dates of the terms of the superior courts. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

When Term Ends.—The term of court ends when the business is disposed of and

the judge leaves the bench, and does not necessarily extend to the end of the period prescribed. *May v. National, etc., Co.*, 172 N. C. 795, 90 S. E. 890 (1916).

When Term Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week," (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875 (1896).

Session at Scene of Crime.—Where at the requests of defendants, a view of the scene of a crime is granted and a short session of the court held there, no prejudicial error is committed under this section. *State v. Stewart*, 189 N. C. 340, 127 S. E. 260 (1925).

Applied in *State v. Dalton*, 206 N. C. 507, 174 S. E. 422 (1934), with reference to Henderson County.

Cited in *West v. Woolworth Co.*, 214 N. C. 214, 198 S. E. 659 (1938).

§ 7-70.1. Assignment of judges to hear nonjury matters.—The Chief Justice of the Supreme Court, whenever he considers that such course will expedite the disposition of pending cases or otherwise aid in the administration of justice, may assign any judge of the superior court, regular, special or emergency, to hear and to determine in any specified county or counties any controversy in civil actions or proceedings pending therein not requiring the intervention of a jury or in which a jury trial has been waived and to conduct pre-trial conferences in civil actions or proceedings pending therein, such assignment having no relation to the existence or convening of any term of court, and such judge, when so assigned and commissioned by the Chief Justice of the Supreme Court shall have, during the period specified in the commission and without relation to any term of court, in the specified county or counties the same jurisdiction as that of the resident judge and of the regularly presiding judge of the judicial district in which such county or counties are located with reference to the hearing and determination of civil matters in vacation. (1951, c. 77.)

§ 7-71. Chief Justice of the Supreme Court to assign judges to hold terms of court when regular judges are not available.—If the regular judge holding the courts for any district is not available for any cause set out in article four, section eleven, of the Constitution to hold any of the terms of court provided for in chapter 367 of the Public Laws of 1941, amending § 7-70, the Chief Justice of the Supreme Court shall assign a judge to hold such term or

terms from among the regular, special or emergency judges. (1951, c. 367, s. 2; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-71.1. Chief Justice of the Supreme Court authorized to cancel terms of court; judges available for assignment elsewhere.—The Chief Justice of the Supreme Court is authorized and empowered, upon a finding by him that any term of superior court for any of the counties of the State is not necessary due to the lack of sufficient official business to be transacted, to cancel any term of superior court scheduled to be held in any of the counties of the State: Provided, that any term of superior court canceled hereunder shall be canceled at least ten days prior to the time for the convening of said court.

Upon the cancellation of any term of superior court the judge scheduled to hold said term of court shall be available for assignment by the Chief Justice of the Supreme Court to hold superior court in any other county in the State. (1943, c. 348, ss. 1, 2; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

For comment on this and the following section, see 21 N. C. Law Rev. 336.

§ 7-71.2. Cancellation not to affect subsequent terms.—The cancellation of any term of court by the Chief Justice of the Supreme Court, as provided in § 7-71.1 shall dispense with the holding of the term of court during the year for which it is canceled, but it shall not affect the terms of court provided by law for the county during succeeding years. (1943, c. 348, s. 3; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

§ 7-72. Civil cases at criminal terms.—At criminal terms of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Also motions for confirmation or rejection of referees' reports may be heard upon ten days' notice and judgment entered on said reports. At criminal terms of court, the court is also authorized and empowered to enter consent orders and consent judgments and to try uncontested civil actions and uncontested divorce cases. (1901, c. 28; Rev., s. 1507; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; C. S., s. 1444; 1931, c. 394; 1947, c. 25.)

Local Modification.—Anson, Bladen, Cumberland, Durham, Gaston, Robeson: C. S. 1444.

Editor's Note.—The 1947 amendment added the last sentence, which represents a further step towards flexibility in the handling of judicial business. 25 N. C. Law Rev. 389.

Failure to Give Notice.—It is required by the provisions of this section that due notice be given of motions in civil action to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the superior court has ordered a dismissal

of the action, the judgment will be reversed on appeal. *Dawkins v. Phillips*, 185 N. C. 608, 116 S. E. 723 (1923).

The superior court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, and therefore when it does not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only will be held for error as being presumptively outside the authority of the court. *Beck v. Lexington Coca-Cola Bottling Co.*, 216 N. C. 579, 5 S. E. (2d) 855 (1939).

§ 7-73. No criminal business at civil terms.—No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend upon any exclusively civil terms, unless there are cases on the civil docket in which they

officially appear, and no criminal process shall be returnable to any term designated for the trial of civil actions alone. (1901, c. 28, ss. 3, 7; Rev., s. 1508; 1913, c. 196; C. S., s. 1445.)

§ 7-73.1. Calendar for all terms for trial of criminal cases.—1. Filing with Clerk; Fixing Day for Trial of Each Case.—At least one week before the beginning of any term of the superior court for the trial of criminal cases, the solicitor shall file with the clerk of the superior court a calendar of the cases he intends to call for trial at that term. The calendar shall fix a day for the trial of each case included thereon.

2. Grand Jury Cases.—The solicitor may place on the calendar for the first day of the term all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day.

3. Trial of Case before Day Fixed.—No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court.

4. Cases Docketed after Calendar Completed.—All cases docketed after the calendar has been made and filed with the clerk of superior court may be placed on the calendar at the discretion of the solicitor.

5. Subpoenaing of Witnesses.—All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses.

6. Proof of Attendance of Witnesses.—Witnesses shall not be entitled to prove their attendance for any days prior to the day on which the case in which they are witnesses is set for trial unless otherwise ordered by the presiding judge.

7. Authority of Court Unaffected.—Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial. (1949, c. 169.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 451.

§ 7-74. Rotation of judges.—The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judges resident in the Eastern Judicial Division shall hold the courts for the spring term, one thousand nine hundred and forty-four, as follows: The judge of the first district shall hold the courts of the second district; the judge of the second, the courts of the third; the judge of the third, the courts of the fourth; the judge of the fourth, the courts of the fifth; the judge of the fifth, the courts of the sixth; the judge of the sixth, the courts of the seventh; the judge of the seventh, the courts of the eighth; the judge of the eighth, the courts of the ninth; the judge of the ninth, the courts of the tenth; the judge of the tenth, the courts of the first; and the judges of the Eastern Judicial Division shall thereafter successively hold the courts of this division, subject to such exchanges of courts as are now provided by law.

The judges resident in the Western Judicial Division shall hold the courts for the spring term, one thousand nine hundred and forty-four, as follows: The judge of the eleventh district shall hold the courts of the twenty-first district; the judge of the twelfth, the courts of the eleventh; the judge of the thirteenth, the courts of the twelfth; the judge of the fourteenth, the courts of the fourteenth; the judge of the fifteenth, the courts of the fifteenth; the judge of the sixteenth, the courts of the sixteenth; the judge of the seventeenth, the courts of the seventeenth; the judge of the eighteenth, the courts of the eighteenth; the judge of the nineteenth, the courts of the nineteenth; the judge of the twentieth, the courts of the twentieth; the judge of the twenty-first, the courts of the thirteenth; and the judges resident in the Western Judicial Division shall thereafter successively hold the courts of this division, subject to such exchanges of courts as are now provided by law.

The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit shall hold

all the courts which fall between July and December, both inclusive. (Const. art. 4, s. 11; R. C., c. 31, s. 20; 1876-7, c. 27; 1879, c. 11; Code, s. 1911; 1885, c. 180; 1901, c. 28, ss. 4, 9; Rev., s. 1509; 1913, c. 196, ss. 4, 5, 6, 9; 1915, c. 15, ss. 3, 4; C. S., s. 1446; 1937, c. 413, s. 1.)

Cross Reference.—As to residence and rotation of judges, see § 7-46.

Constitutional Provisions.—Sec. 22 of Art. IV of the Constitution, requiring the courts to be always open, must be construed in connection with § 11 of the same article, and does not apply to the terms of court and matters connected therewith. *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167 (1894).

Judge Is Essential.—There can be no session of a court without a judge; hence, when the judge leaves the bench for the term, although no notice is given of the final adjournment, or it is ordered to expire by limitation, the term ends and the judge cannot hear any matters out of the courthouse, except by consent, unless it is "chambers" business. *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167 (1894).

Jurisdiction of "in Chambers" Matters.—Within the period of assignment the judge so assigned to a district has jurisdiction of all "in chambers" matters arising in the district. Moreover, "the judge assigned to the district" is specifically designated by § 1-493 as one of the judges to whom all restraining orders and injunctions shall be made returnable. *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944). See also, *Ridenhour v. Ridenhour*, 225 N. C. 508, 35 S. E. (2d) 617 (1945).

§ 7-75. Exchange of courts.—By consent of the Governor the judges may exchange the courts of a particular county or counties; and the judges resident in the western division and the judges resident in the eastern division may exchange courts or circuits with the consent of the Governor; but no judge shall hold all the courts in one district oftener than once every four years. When a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor. (Const. art. 4, s. 11; R. C., c. 31, s. 20; 1879, c. 11; Code, s. 913; Rev., s. 1511; 1915, c. 15, s. 4; C. S., s. 1447.)

Under Prior Law.—Before the Act of 1879, assigning the judges to the different districts, an exchange of circuits with the consent of the Governor under the Act of 1877 was not in violation of § 11, Art. IV, of the amended Constitution. *State v. McGimsey*, 80 N. C. 377 (1879).

A partial exchange of circuits between two of the judges of the superior court, with the approval of the Governor, is legal. *State v. Graham*, 75 N. C. 256 (1876).

Power of Legislation.—Neither does this prohibitory clause restrict the legis-

Injunction—Failure of Judge to Hear Order.—If the judge before whom the order is made returnable fails to hear it, any judge resident in or assigned to or holding by exchange the courts of some adjoining district may hear it upon giving ten days' notice to the parties interested. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893).

A judge assigned to a district is the judge thereof for six months, beginning either January or July first, and where a restraining order was made returnable before such judge at a place outside of the district, and after the courts were over, but before the end of the term of assignment to the district, such judge had jurisdiction to hear the application and grant the injunction until the hearing. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893).

Term Beginning in June.—When a term of court begins the last part of June, the judge of the superior court assigned to that district for the spring circuit has authority throughout the term of court, even though the term runs over into July, and the second week thereof starts during the month of July, since any term which begins in June "falls" between January and June within the meaning of the statute. *West v. Woolworth Co.*, 214 N. C. 214, 198 S. E. 659 (1938).

lature from creating an extra term of the superior court of a county and designating the resident judge to hold the same. *State v. Monroe*, 80 N. C. 373 (1879).

Governor's Power.—When the Constitution (and this section) has clothed the Governor with the power to require a judge to hold a court in a district other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment, of which the Governor must of necessity be the judge, and the Governor issues a commission, the Supreme Court will assume that, in fact, the

emergency had arisen which would sanction the issuing of the commission, and the same will be recognized as valid if the Governor could, for any reason, have lawfully issued it. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

Governor's Authority a Command.—The Governor can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such court, expressing in the commission that it is done with his consent, and under that authority, the judge holds the court, as between the judge and the suitors in the court, the consent and authority granted by the Governor is equivalent to a command. *State v. Watson*, 75 N. C. 136 (1876).

De Facto Judge.—Where the Governor issues a commission to one of the judges of the superior courts, authorizing him to hold certain terms of the superior courts, and the judge undertakes to discharge the duties required of him, he is, so far as the public and third persons are concerned a de facto judge so long as he assumes to act in that capacity, and this is so although the commission was issued without authority of law. *State v. Lewis*, 107

N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

Death of Judge.—Upon the death of one of the judges of the superior courts, the Governor has the authority under this section to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

Prohibitory Clause Considered.—The inhibition contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor, nor to the holding of special terms under § 7-78. *State v. Turner*, 119 N. C. 841, 25 S. E. 810 (1896).

Same—Applies to Series of Courts.—The provision that “no judge (of the superior courts) shall hold the courts in the same district oftener than once in four years,” is held to apply only to the series of courts forming a district over which a judge, in his riding, is to preside, and has no reference to the courts separately considered. *State v. Speaks*, 95 N. C. 689 (1886).

§ 7-76. Court adjourned by sheriff when judge not present.—If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the term, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term. (Code, s. 926; 1887, c. 13; 1901, c. 269; Rev., s. 1510; C. S., s. 1448.)

Editor's Note.—For comment on this section, see 21 N. C. Law Rev. 338.

Presumption of Adjournment.—Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it will be presumed that the sheriff had duly opened the court and adjourned it from day to day as provided in this section. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486 (1889).

Duty of Defendant to Attend Special Term.—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. *State v. Horton*, 123 N. C. 695, 31 S.

E. 218 (1898).

Implied Power of Judge to Order Adjournment.—The provision in this section that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done “unless the sheriff shall be sooner informed that the judge, from any cause cannot hold the term,” which implies the power of the judge to order an adjournment to a later day in the term. *State v. Wood*, 175 N. C. 809, 95 S. E. 1050 (1918).

Failure of Sheriff to Adjourn Court.—The provision in this section that where the judge fails to appear at any term until the fourth day thereof, inclusive, the sheriff shall adjourn the court until the

next term, does not avoid the acts of any term where, upon the nonappearance of the judge, the sheriff did not in fact adjourn the court, and the judge afterwards actually appeared and held court. *Norwood v. Thorp*, 64 N. C. 682 (1870).

Where the sheriff has not continued a term of the superior court for the absence of the judge to hold the same, the judge may appear at any day within the term, and the proceedings thereafter will be valid. *State v. Wood*, 175 N. C. 809, 95 S. E. 1050 (1918).

All Matters Carried Over.—This section by operation of law carries all matters over to the next term, in the same plight and condition. *State v. Horton*, 123 N. C. 695, 31 S. E. 218 (1898).

Newly Elected Judge.—Where a newly

elected judge, as successor to one who was to have held the term of a court commencing on the 30th of December, continuing for several weeks, and designated by the statute as a spring term, has ordered the sheriff to adjourn the court from day to day, not exceeding four days, to enable him to take the oath of office and preside, and accordingly he qualifies and holds the court, those of his acts are valid, as an officer de jure. And if not, they are valid as those of an officer de facto, and an exception to the validity of a trial of an action on that ground is untenable. *State v. Harden*, 177 N. C. 580, 98 S. E. 782 (1919).

Stated in *State v. McGimsey*, 80 N. C. 377 (1879).

ARTICLE 10.

Special Terms of Court.

§ 7-77. Chief Justice of the Supreme Court may designate judge.—The Chief Justice of the Supreme Court has the power to appoint any judge to hold special terms of the superior court in any county. (Const., art. 4, s. 11; 1879, c. 11; Code, s. 913; Rev., s. 1511; C. S., s. 1449; 1951, c. 491, s. 1.)

Cross Reference.—See §§ 7-71, 7-75, substituted “Chief Justice of the Supreme Court” for “Governor”.

Editor’s Note.—The 1951 amendment

§ 7-78. Chief Justice of the Supreme Court may order special terms.—Whenever it shall appear to the Chief Justice of the Supreme Court by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall order a special term and issue an order to the judge of the judicial district in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district, and hold for such time as he may designate, unless the business be earlier disposed of. The Chief Justice, when in his opinion the public interest so requires, may order a special term of court to be held by a regular, special, or emergency judge of the superior court in any county or district during the holding of a regular term in such county or district. (R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Code, s. 914; Rev., s. 1512; C. S., s. 1450; Ex. Sess. 1924, c. 100; 1951, c. 491, s. 3.)

Editor’s Note.—The 1951 amendment substituted in the first sentence “Chief Justice of the Supreme Court” for “Governor”, and inserted therein the words “order a special term and”. It also rewrote the second sentence.

The cases cited below were decided prior to the 1951 amendment.

Section Constitutional.—This section is constitutional. *State v. Ketchey*, 70 N. C. 621 (1874).

Particular Class of Cases.—In appointing special terms the Governor is not

bound by the certificate of the judge, so far as to confine such terms to the trial of a particular class of cases. *State v. Ketchey*, 70 N. C. 621 (1874).

Certificate Not Essential Part of Record.—The certificate does not constitute an essential part of the record of the term. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

Regular Order Presumed.—When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order

for holding it was duly made, and that it was duly held. *Sparkman v. Daughtry*, 35 N. C. 168 (1851).

The power of the Governor to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited as a reason for the commission is the power of the judge restricted to the trial of indictments found before that term. *State v. Register*, 133 N. C. 746, 46 S. E. 21 (1903). See also note of *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890), under § 7-75.

No reason need be assigned by the Governor for calling special terms. *State v. Watson*, 75 N. C. 136 (1876). He is the sole judge of the evidence necessitating such action. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

Must Appoint Judge.—When the Governor has ordered such term as provided in this section to be held in any county of

this State, it is the duty of the Governor to appoint one of the judges of the superior court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. *State v. Baxter*, 208 N. C. 90, 179 S. E. 450 (1935).

Plea Denying Existence of Court.—A plea of the defendant that the court was unlawfully called because the Governor was absent from the State when he attempted to order the holding of the court is properly overruled. *State v. Hall*, 142 N. C. 710, 55 S. E. 806 (1906).

Arraignment at Former Term.—It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. *State v. Ketchey*, 70 N. C. 621 (1874).

Applied in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 7-79. Compensation of judge.—Any regular judge appointed to hold a special term of court shall attend and hold such court, and shall be paid as compensation therefor at the rate of one hundred dollars per week and his actual expenses incurred in attending such special term by the county in which the special term is held. But any such judge who is in a district having fewer than twenty regular weeks of court for the six months shall hold without extra compensation, if directed by the Chief Justice of the Supreme Court, enough extra weeks of court to make out twenty weeks for the six months. (R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Code, s. 914; 1901, c. 167; Rev., s. 1512; 1909, c. 85, s. 1; 1913, c. 63; C. S., s. 1451; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

Reduction of Salary.—The Constitution provides that the salaries of the judges shall not be diminished during their continuance in office. The additional compen-

sation of one hundred dollars given to a superior court judge, by this section, for services in holding a special term, is a part of his salary, hence, any statutory provision providing for a reduction thereof is void as being unconstitutional. *Buxton v. Comm.*, 82 N. C. 92 (1880).

§ 7-80. Notice of special terms.—Whenever the Chief Justice of the Supreme Court shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement. (1868-9, c. 273; Code, s. 915; Rev., s. 1513; C. S., s. 1452; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

Not Essential Part of Record.—Neither the certificate forwarded to the executive (now Chief Justice) under § 7-78 nor the notice to the county commissioners constitutes an essential part of the record of the term. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

The notice is directory and not mandatory under this section. *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

And Is for the Benefit of the Public.—The notice which is required to be published under this section is designed not for the purpose of warning the jury of the coming term. These persons receive separate notices or summons. Rather, it serves the purpose of notifying the public.

It follows, then, that the failure to comply with this section goes to the setup or organization of the court itself rather than of the jury. *State v. Boykin*, 211 N. C. 407,

191 S. E. 18 (1937).

Cited in *State v. Baxter*, 208 N. C. 90, 179 S. E. 450 (1935).

§ 7-81. Certificate of attendance.—The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive from the commissioners of the county in which the court is held the compensation provided by law. (1868-9, c. 273; Code, s. 918; 1901, c. 167; Rev., s. 1514; 1909, c. 85, s. 1; 1913, c. 63; C. S., s. 1453.)

§ 7-82. Grand juries at special terms.—There shall be no grand jury at any special term, unless the same shall be ordered by the Chief Justice of the Supreme Court. (1868-9, c. 273; Code, s. 921; Rev., s. 1515; C. S., s. 1454; 1951, c. 491, s. 1.)

Editor's Note.—The 1951 amendment substituted "Chief Justice of the Supreme Court" for "Governor".

Absence of Order Voids Indictment.—In the absence of any order that a grand

jury be drawn at a special term, as provided by this section, the indictment returned at said term is void. *State v. Baxter*, 208 N. C. 90, 179 S. E. 450 (1935).

§ 7-83. Jurisdiction.—The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have. (1868-9, c. 273; Code, s. 916; Rev., s. 1516; C. S., s. 1455.)

Term Not Confined to Particular Class of Cases.—In appointing a special term the Governor (now Chief Justice) is not bound by the certificate of the judge, so far as to confine such term to the trial of a particular class of cases. *State v. Ketchey*, 70 N. C. 621 (1874).

Jurisdiction Not Dependent upon Arraignment at Former Term.—It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. *State v. Ketchey*, 70 N. C. 621 (1874).

Removal of Cause.—A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. *Sparkman v. Dau-*

ghtry, 35 N. C. 168 (1851).

Judgment by Default.—Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. *Reynolds v. Greensboro, etc., Co.*, 153 N. C. 342, 69 S. E. 248 (1910).

Court Held Outside Judge's District.—A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties. *Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130 (1897).

§ 7-84. Attendance and process at special terms.—All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. (1844, c. 10; 1848, c. 29; R. C., c. 31, s. 23; Code, s. 919; Rev., s. 1517; C. S., s. 1456.)

Duty of Defendant to Appear.—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special

term subsequently appointed and held. *State v. Horton*, 123 N. C. 695, 31 S. E. 218 (1898).

Applied in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 7-85. Subpoenas returnable.—Subpoenas may issue returnable on any day of any special term. (1868-9, c. 273; Code, s. 920; Rev., s. 1518; C. S., s. 1457.)

ARTICLE 11.

Special Regulations.

§ 7-86. **Reading the minutes.**—Every morning during the term the judge presiding shall order the reading of the minutes of the court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of the term. (1861, c. 3; Code, s. 925; Rev., s. 1519; C. S., s. 1458.)

§ 7-87. **Officer attending juries sworn.**—When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury that he may be called to attend during that term. (1801, c. 592, P. R.; R. C., c. 31, s. 36; Code, s. 927; Rev., s. 1527; C. S., s. 1459.)

Cross Reference.—As to form of oath, see § 11-11.

§ 7-88. **Quakers may wear hats in court.**—The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect. (1784, c. 209, P. R.; R. C., c. 31, s. 131; Code, s. 943; Rev., s. 1528; C. S., s. 1460.)

§ 7-89. **Court reporters.**—Upon the request of a judge holding a superior court in any county in the State, the board of county commissioners in such county shall employ a competent stenographer to take down the proceedings of the court, at a compensation not to exceed five dollars per day and actual expenses, to be paid by the county in which the court is held: Provided, that the compensation of said stenographers in counties composing the sixteenth judicial district shall not exceed ten dollars per day.

The judge is authorized to tax a reasonable fee against the losing party in every action, civil and criminal, to be turned into the county treasury towards reimbursing the county, but no fee shall be taxed against a losing party suing in forma pauperis.

Every stenographer so employed shall make three copies of the proceedings in every case appealed to the Supreme Court, without extra charge, and shall furnish one copy to the attorneys on each side and file one copy with the clerk of the superior court of the county in which any such case is tried, and shall obey all orders of the judge relative to the time in which any such work shall be done: Provided, that the restrictions herein against an extra charge for making copies of the proceedings in cases appealed to the Supreme Court shall not apply to counties composing the sixteenth judicial district.

Every stenographer so employed shall, before entering upon the discharge of his duties, be duly sworn to well, truly, and correctly take down and transcribe the proceedings of the court, except the argument of counsel, and the charge of the court thus taken down and transcribed shall be held to be a compliance with the law requiring the judge to put his instructions to the jury in writing.

This section shall not apply to any county which has a court stenographer authorized by law: Provided, that the board of county commissioners of Mecklenburg County may, by resolution approving this section, bring said county within the provisions of the same: Provided further, that this section shall not apply to the following counties: Alleghany, Brunswick, Caldwell, Camden, Carteret, Caswell, Chatham, Currituck, Dare, Davidson, Davie, Forsyth, Greene, Harnett, Haywood, Hoke, New Hanover, Orange, Pender, Person, Transylvania, Union,

Watauga. (Ex. Sess. 1913, c. 69; C. S., s. 1461; Ex. Sess. 1921, c. 57; 1927, c. 268; Pub. Loc. 1927, c. 49; 1933, c. 75, s. 2.)

Local Modification.—Alamance: Ex. 5; Johnston: 1943, c. 689; McDowell: Sess. 1921, c. 2; 1935, c. 474; Burke, Lincoln, Catawba: 1929, cc. 53, 260; Cleveland: 1929, cc. 53, 260; Robeson: 1935, c. 9; Surry: 1927, c. 268, land: 1945, c. 505; Halifax: 1929, c. 45, s. 2; Wayne: 1927, c. 156.

§ 7-90. **Official court reporter for second judicial district.**—The resident judge of the second judicial district is hereby authorized and empowered to appoint an official court reporter for one or more or all of the counties in said district who shall serve at the will of the resident judge, and whose appointment may be terminated by thirty days' written notice thereof.

The appointment of such reporter or reporters shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same, or a certified copy thereof, shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe an oath in words substantially as follows: "I,, do solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the county of in the second judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me, God." Said oath shall be filed in the office of each of the clerks of the superior courts of the counties in which said reporter is to officiate, and recorded and indexed on the minute dockets of said courts.

If on account of sickness, or for other cause, said reporter is unable to attend upon any of the regular courts of said district, and for conflict and special terms, the resident judge may appoint a reporter pro tem. for said court or courts, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk. In lieu of appointing a reporter pro tem. for each of said courts, the resident judge may, in his discretion, appoint a reporter pro tem. for a stated period whose duty it shall be to report any and all courts in the county or counties designated in the appointment, which the regular court reporter is for any cause unable to report.

The resident judge shall likewise fix the compensation to be received by such reporter and such reporter pro tem.: Provided, however, such compensation shall not exceed sixteen dollars per day and actual expenses upon a weekly basis.

The testimony taken and transcribed by said court reporter or said court reporter pro tem., as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rule governing the introduction of depositions in civil actions. (1933, c. 335; 1947, c. 794; 1951, c. 803.)

Editor's Note.—The 1947 amendment fifth paragraph, and the 1951 amendment substituted "thirteen" for "ten" in the substituted "sixteen" therefor.

§ 7-91. **Official court reporter for fifth judicial district.**—The resident judge of the fifth judicial district is hereby authorized and empowered to appoint an official court reporter for all of the counties in said district, who shall serve at the will of the resident judge, and whose appointment may be terminated at thirty days' written notice thereof.

The appointment of such reporter shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same or a certified copy thereof shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter

shall take and subscribe an oath in words substantially as follows: "I, do solemnly swear that I will to the best of my ability discharge the duties of the office of court reporter in and for the counties of the fifth judicial district and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct or as I may be required to do under the law, so help me, God." Said oath shall be filed in the office of each of the clerks of the superior courts of the counties of said district and recorded and indexed on the minute dockets of said courts.

If on account of sickness or for other cause said reporter is unable to attend upon any regular courts of said district, and for conflict of special terms the resident judge may appoint a reporter pro tem. for said court or courts and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk. In lieu of appointing a reporter pro tem. for said district the resident judge may, in his discretion, appoint a reporter pro tem. for a stated period, whose duty it shall be to report any and all of the courts designated in the appointment which the regular court reporter is for any cause unable to report.

The resident judge shall likewise fix the compensation to be received by said reporter and said reporter pro tem., provided, however, such compensation shall not exceed ten dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem. must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter or said reporter pro tem. as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any civil action in any of the courts in this State as the deposition of the witness whose testimony is so taken and transcribed in the same manner and under the same rules governing the introduction of depositions in civil actions: Provided, however, that such transcript of testimony shall be admissible in evidence only in the cause in which same was taken. (1935, c. 128.)

Local Modification.—Carteret: 1941, c. 137; Greene: 1943, c. 284; Pitt: 1947, c. 759; 1949, c. 1185.

§ 7-92. Official court reporter for sixth judicial district.—The resident judge of the sixth judicial district is hereby authorized and empowered to appoint an official court reporter for one or more, or all of the counties in said district, whose term of office shall be for a period of five years from and after qualification: Provided, however, that said judge shall have the right to remove said reporter for cause at any time.

The appointment of such reporter or reporters shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same, or a certified copy thereof shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe the oath provided by law for public officers, and shall in addition thereto take and subscribe an oath in words substantially as follows: "I,, do furthermore solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the sixth judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me God." Said oath shall be filed in the office of the clerk of the superior court of the county in which said reporter resides, and recorded and indexed by him on the minute docket of said court.

In case of sickness, or for other cause, if said reporter fails to attend upon

any of the courts of said district, the presiding judge may appoint a reporter pro tem., for said court, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk.

The resident judge shall likewise fix the compensation to be received, by said reporter, and said reporter pro tem., provided, however, such compensation shall not exceed twelve and one-half dollars per day and actual expenses upon a weekly basis.

Said court reporter or reporter pro tem. must, upon request of counsel when the presiding judge shall find as a fact that same is necessary and so order, deliver to the clerk of the superior court in which said cause is pending a transcript of the evidence in that cause within fifteen days from the adjournment of the term of court in which such evidence was taken.

The testimony taken and transcribed by said court reporter, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is so taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions. (1931, c. 154, s. 5; 1935, c. 420; 1951, c. 940, s. 1.)

Editor's Note.—The 1951 amendment in lieu of the word "ten" formerly appearing inserted the words "twelve and one-half" in the fifth paragraph.

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

ARTICLE 12.

Commission for Improvement of Laws.

§ 7-93: Repealed by Session Laws 1943, c. 746.

Editor's Note.—The duties of the Commission created by the repealed section were similar to those theretofore conferred on the Judicial Conference by c. 244 of the Public Laws 1925, which was repealed by Public Laws 1931, c. 451. The Act of 1925 was amended by Public Laws 1927, c. 39.

The repealed sections of this article were codified from Public Laws 1931, c. 98.

§ 7-94: Repealed by Session Laws 1943, c. 746.

Editor's Note.—The repealed section related to the members of the former Commission. These consisted of the Attorney General, the chairman of each of the committees on judiciary of the Senate and the House of Representatives of the General Assembly, two members appointed from the justices of the Supreme Court and the judges of the superior courts, two members who were active practitioners in the trial and appellate courts, three members who were appointed from the faculties of law in the various universities in the State, and two members, not attorneys at law, who were men of proven ability in other occupations.

§§ 7-95 to 7-100: Repealed by Session Laws 1943, c. 746.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

ARTICLE 13.

Domestic Relations Courts.

§ 7-101. **Establishment by county or city or both.**—The board of county commissioners of any county or the governing body of any incorporated city shall have authority to establish a "domestic relations court", which court may be a joint county and city court, as provided in § 7-102 or a court for the county or city as may be determined by the governing authorities. In counties with two or more cities, any city may join any other city or cities in such

county in establishing a domestic relations court; or any number of cities may join the county in which they are situate in establishing a domestic relations court.

As used in this section, "city" means any incorporated city or town with a population of at least five thousand as shown by the latest decennial census. (1929, c. 343, s. 1; 1949, cc. 420, 957; 1951, c. 1111, s. 2.)

Local Modification.—Edgecombe, Nash, Pitt, Wayne: 1929, c. 343, s. 10; Buncombe: 1929, c. 343, s. 10; 1941, c. 208, s. 2; Forsyth: 1929, c. 343, s. 10; 1931, c. 221, s. 2; Franklin, Henderson, Transylvania: 1951, c. 1111, s. 3; Wake: 1929, c. 343, s. 10; Pub. Loc. 1941, c. 339.

Cross Reference.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq.

Editor's Note.—The 1951 amendment rewrote this section eliminating the population requirements. It also rewrote the

title to this article.

By virtue of Session Laws 1947, c. 142, and Session Laws 1949, cc. 78, 334 and 707, the counties of New Hanover, Gaston, Durham and Guilford, respectively, have been stricken from the list of counties appearing under Local Modification. The acts made the counties mentioned subject to the provisions of this article, which was also made applicable to the City of High Point by Session Laws 1947, c. 962.

§ 7-102. Vote on establishment of court; any other city in county with required population may have such court.—In case the board of county commissioners and governing authorities of a particular city decide to establish a joint city and county domestic relations court, they, voting as separate bodies, shall determine whether or not such domestic relations court shall be established. If both bodies, shall vote for its establishment, each of them shall record the resolutions in their minutes and upon such consent by both boards, the court shall be established. In counties in which the said joint court is thus established by the board of county commissioners and the governing authorities of the county and city such establishment of the court shall not prevent any other city within the territorial limits of the county and having more than twenty-five thousand inhabitants, establishing its own court under section 7-101. (1929, c. 343, s. 2.)

§ 7-103. Jurisdiction.—Said domestic relations court shall have, and is hereby vested with all the power, authority, and jurisdiction heretofore vested by law in the juvenile courts of North Carolina, and said power, authority, and jurisdiction being as fully vested in the domestic relations court as if herein particularly set forth in detail; and in addition thereto the said domestic relations court shall have exclusive original jurisdiction over the following classes of cases:

(a) All cases where any adult is charged with abandonment, nonsupport, or desertion of any minor child, or where either spouse is charged with abandonment, nonsupport, or desertion of the other.

(b) All cases involving voluntary desertion of any juvenile by its mother.

(c) All cases involving the custody of juveniles, except where the case is tried in superior court as a part of any divorce proceeding.

(d) All cases where assault, or assault and battery, on a juvenile is charged against an adult, or where husband or wife is charged with assault, or assault and battery, upon the other.

(e) All cases in which an adult is charged with causing or being responsible for delinquency, dependency, or neglect of a juvenile.

(f) All bastardy cases within said county.

(g) All cases wherein any person is charged with receiving stolen goods from any juvenile, knowing them to be stolen.

(h) All cases involving violation of the North Carolina School Attendance Law as set forth in Public Laws of North Carolina, one thousand nine hundred and nineteen, chapter one hundred, and Public Laws of North Carolina, one thousand nine hundred and twenty-three, chapter one hundred and thirty-six; and in §§ 115-302 to 115-312, inclusive; and such other laws relative to school attendance as may hereafter be enacted.

(i) In either case where either parent institutes a divorce action when there is a minor child or children, it shall be the duty of the clerk of the superior court to refer the case for investigation as to the child, or children, to the domestic relations court, and the judge of the domestic relations court shall make his recommendations to the judge of the superior court as to the disposition of the child, or children, for the consideration of the judge of the superior court in disposing of the custody of the said child or children. (1929, c. 343, s. 3; 1941, c. 308; 1943, c. 470, s. 1.)

Cross References.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—The 1941 amendment struck out former subsection (g), relating to the adoption of juveniles, and relettered the subsequent subsections in alphabetical order. See 19 N. C. Law Rev. 453.

The 1943 amendment substituted "minor child" for "juvenile" in subsection (a). For comment on the amendment, see 21 N. C. Law Rev. 343.

Issuance of Process and Hearing Complaints.—There is no statutory provision referring specifically to issuance of process, but the statute indicates that the same

persons who would issue process in other courts having jurisdiction of the offenses of which the domestic relations court is given jurisdiction, would be authorized to issue process for the domestic relations court, and hence hear complaints. 15 N. C. Law Rev. 113.

An exclusive remedy to compel a father to provide for the support of his illegitimate child, is provided by this section and chapter 49 of General Statutes, and the statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. *Allen v. Hunnicutt*, 230 N. C. 49, 52 S. E. (2d) 18 (1949).

Cited in *In re Morris*, 224 N. C. 487, 31 S. E. (2d) 539 (1944).

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile court officers may be declared officers of new court.—It shall be the duty of the board of commissioners of any county and the governing board of any city, in which a joint court of domestic relations is established, as provided in this article, or of the governing authorities of any city or county in which an independent domestic relations court shall be established, as provided in this article, acting jointly, in the first instance, or independently, in the second instance, to elect a judge of the domestic relations court and to fix his salary and provide for the payment of same, his term of office to run from the time of his election to the second Monday in July in each odd-numbered year and until his successor shall have been elected and qualified. The regular term of office shall be for a term of two years and until his successor is elected and qualified. If any vacancy should occur in said office during the two years' term, for any cause, it shall be filled for the unexpired term in the same manner and by the same bodies as provided for the election of said judge.

It shall be the duty of the judge of the domestic relations court to appoint a clerk for said court, the salary of said clerk to be fixed, provided for, and paid by the board of county commissioners of any of such counties and the governing board of any of such cities, acting jointly, or independently when a joint county and city court is not established.

And the officers of the juvenile court of any of such cities and of any such counties, as now constituted by law may be declared to be officers of the domestic relations court.

The probation officers of domestic relations court and their method of appointment shall be the same as now provided for in § 110-31, for probation officers of the juvenile court. The salaries of said probation officers, and the necessary equipment for the proper maintenance and functioning of said court, shall be a charge upon such county and such city jointly, or upon the county or city, if it is an independent court.

Wherever a domestic relations court is established a substitute judge of said

court may be appointed in the same manner as the regular judge of said court. Such substitute judge shall serve during the absence, illness or other temporary disability of the regular judge, and while serving shall have the same power and authority as the regular judge. Such substitute judge shall receive such compensation, on a per diem basis, as shall be determined and provided by the governing body or bodies appointing him. (1929, c. 343, s. 4; 1931, c. 221, s. 1; 1943, c. 470, s. 2.)

Local Modification.—Buncombe: 1947, c. 989; Forsyth: 1931, c. 221, s. 2; Mecklenburg: 1937, c. 268; 1949, c. 949; City of Charlotte: 1949, c. 949.

Editor's Note.—The 1943 amendment added the last paragraph of this section. For comment on the amendment, see 21 N. C. Law Rev. 343.

§ 7-105. Co-operation of all peace officers.—It shall be the duty of all officers of the counties and of the cities to assist the domestic relations court in any and all ways in the line of their official duty as fully and to the same extent and in the same manner as they heretofore have been authorized and required to do in the case of all other courts. (1929, c. 343, s. 5.)

§ 7-106. Procedure, practice and punishments.—The procedure, practice, and punishments imposed in the domestic relations court as established in this article shall be the same as now provided by law in courts now having original jurisdiction of the various offenses or causes enumerated in this article, and the judge of the said domestic relations court is hereby granted the power to prescribe such rules and fix such modes of procedure, as, in his discretion, will best effect the purposes for which said court is created.

Such court, when established, shall adopt an official seal, shall keep and preserve adequate dockets and other records of its proceedings, and shall be a court of record. The judge and clerk of said court shall have power to administer oaths and to issue warrants and other process in said court. (1929, c. 343, s. 6; 1943, c. 470, s. 3.)

Editor's Note.—The 1943 amendment added the second paragraph of this section.

For comment on the 1943 amendment to this and the following section, see 21 N. C. Law Rev. 343.

§ 7-107. Right of appeal to superior court; trial de novo.—Wherever in this article criminal jurisdiction is conferred upon the domestic relations court there shall be the same right of appeal from this court as from recorders' courts or other inferior criminal courts to the superior court, and the same rules and regulations of such appeals from inferior courts shall apply to appeals from this court, and in the superior court the trial shall be de novo. This provision shall apply also to the trials in bastardy cases, and cases involving the custody of juveniles. (1929, c. 343, s. 7; 1943, c. 470, s. 4.)

Editor's Note.—The 1943 amendment made this section applicable to cases involving the custody of juveniles.

§ 7-108. Offenses before court to be petty misdemeanors; demand for jury trial; appearance bonds.—All the offenses for the trial of which the domestic relations court is given jurisdiction are hereby declared to be petty misdemeanors punishable as now prescribed by law. On the trial before such domestic relations court, if a jury trial is demanded, the cause shall be therewith transferred for trial to some criminal term of the superior court of the counties in which the domestic relations court is situated. The defendant or defendants shall be held under an adequate bond to secure his or their attendance at the criminal term of the superior court to which the record is transferred. If in the exercise of the jurisdiction hereinbefore conferred upon the domestic relations court, it should appear that a felony has been committed, said court shall have jurisdiction and authority upon proper investigation to bind over the alleged

felon in all cases in which probable cause is found, to the superior court of the county, under proper bond and recognizances. (1929, c. 343, s. 8.)

§ 7-109. **Pending cases in juvenile court transferred to new court.**—All causes pending in the juvenile court of the county or city at the time of the organization of any domestic relations court within said county or city, shall be transferred to the domestic relations court for final adjudication. (1929, c. 343, s. 9.)

§ 7-110. **Cases transferred from superior court.**—Upon the establishment of a domestic relations court as authorized in this article, the clerk of the superior court and the clerk of any inferior criminal court of the county shall immediately transfer from the superior court and from any inferior criminal courts of the county to such domestic relations court all actions pending in the superior court of which the domestic relations court has jurisdiction as in this article conferred, whether such actions are untried or tried and retained for judgment, sentence or further orders, and the domestic relations court shall immediately have jurisdiction of such actions and shall thereafter try, enter further orders or dispose of such actions in the same manner and to the same extent as if said actions had been initiated in said domestic relations court. (1941, c. 208, s. 1; 1949, c. 600.)

Editor's Note.—The 1949 amendment inserted the provisions for transfer of cases from inferior criminal courts to domestic relations courts. For brief comment on amendment, see 27 N. C. Law Rev. 441.

§ 7-111. **Discontinuance of court.**—After the establishment of any domestic relations court by any county commissioners or by the governing authorities of a particular city, or the establishment of a joint county-city court of domestic relations, such board, governing authorities, or both, may, by resolution or resolutions, discontinue any such court. (1941, c. 208, s. 2½.)

SUBCHAPTER V. JUSTICES OF THE PEACE.

ARTICLE 14.

Election and Qualification.

§ 7-112. **Constitution, article seven, abrogated; exceptions.**—All the provisions of article seven of the Constitution inconsistent with this chapter, except those contained in sections seven and twelve are hereby abrogated, and the provisions of this article substituted in their place; subject, however, to the power of the General Assembly to alter, amend or abrogate the provisions of this article, and to substitute others in their stead, as provided in section thirteen of article seven of the Constitution. (1876-7, c. 141, s. 7; Code, s. 818; Rev., s. 1408; C. S., s. 1462.)

§ 7-113. **Election and number of justices.**—At every general election held for members of the General Assembly there shall be elected in each township three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such city or town, who shall hold office for a term of two years from and after the first Monday in December next after their election. (1876-7, c. 141; Code, s. 819; 1895, c. 157; 1905, cc. 35, 44, 148; Rev., s. 1409; 1907, c. 225; 1909, cc. 177, 716; C. S., s. 1463.)

Local Modification. — Bertie, Caswell, Chowan, Franklin: C. S. 1464; Gaston: 1931, c. 256; Granville: C. S. 1464; New Hanover (City of Wilmington): C. S. 1464; Vance: C. S. 1466; Wake: 1937, c. 113; Warren: C. S. 1465.

Repeal as to Certain Counties.—For repeal of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

Number Elected.—Under the legislation of 1895, since continued, each township is

entitled to elect three justices of the peace on one ballot, and no more, unless the township shall contain a city or incorporated town with as much as 1,000 inhabitants, in that case one additional

justice for every 1,000 inhabitants. A ticket containing more names than the elector has a right to vote for, is to be void, and not counted. *Mitchell v. Alley*, 126 N. C. 84, 35 S. E. 231 (1900).

§ 7-114. Oath of office; vacancies filled.—Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oaths of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the General Assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the offices of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the Governor. All other vacancies shall be filled by the clerk of the superior court. (Code, s. 821; 1901, c. 37; Rev., s. 1411; C. S., s. 1467.)

Cross Reference.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7.

Repeal as to Certain Counties.—As to repeal of the last two sentences of this section as to counties coming within the provisions of article 14A of this chapter, see § 7-120.11.

Section Constitutional.—This section is not unconstitutional. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812 (1887).

Duty of Clerk.—It is the duty of the clerk to administer the oath to the justices elected or appointed. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812 (1887).

Appointed by Clerk.—The authority of

the clerks of the superior courts to appoint justices of the peace is confined to vacancies caused by the death, resignation or other causes during the term. *Gilmer v. Holton*, 98 N. C. 26, 3 S. E. 812 (1887); *Etheridge v. Leary*, 227 N. C. 636, 43 S. E. (2d) 847 (1947).

Misbehavior in Office.—If one elected to an office takes possession of the same and engages in the exercise of its duties and misbehaves by taking unlawful and extortionate fees, he will be liable for such misbehavior, and may be indicted therefor, notwithstanding the fact he had failed to take the oath of office. *State v. Cansler*, 75 N. C. 442 (1876).

§ 7-115. Governor may appoint justices.—The Governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as justices of the peace, who shall hold their office for four years from and after the date of their appointment; and, on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for other officers. The Governor shall issue to each justice of the peace so appointed a commission, a certificate of which shall be deposited with the clerk of the court and filed among the records, and he shall note on his minutes the qualifications of the justice of the peace.

Any commission so issued by the Governor or his predecessor shall be revocable by him in his discretion upon complaint being made against such justice of the peace and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any justice of the peace appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such justice of the peace a copy of said order and mail a copy of same to said justice of the peace.

Any person holding himself out to the public as a justice of the peace, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (1917, c. 40; C. S., s. 1468; 1927, c. 116.)

Repeal as to Certain Counties.—For repeal of this section as to counties coming

within the provisions of article 14A of this chapter, see § 7-120.11.

§ 7-116. Forfeiture of office.—When any justice of the peace removes

out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office; and any such justice presuming to act thereafter, contrary to this section, unless reelected or reappointed, shall be guilty of a misdemeanor. (Code, s. 822; Rev., ss. 1412, 3589; C. S., s. 1469.)

§ 7-117. **Resignation.**—Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same. (Code, s. 823; Rev., s. 1413; C. S., s. 1470.)

§ 7-118. **Removal and disqualification for crime.**—Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this State. (Code, s. 826; Rev., s. 1414; C. S., s. 1471.)

Criminal Liability.—The functions of a justice of the peace are ministerial, in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for trial, and in the exercise of such functions, if he act corruptly, oppressively or from any other bad motive, he is liable to indictment. *State v. Sneed*, 84 N. C. 817 (1881).

§ 7-119. **Justice may hold other office.**—Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident. (Const., art. 14, s. 7; Code, s. 825; Rev., s. 1415; C. S., s. 1472.)

Cross Reference.—See § 128-1; Const., Art. XIV, § 7, and annotations thereto.

Justice of Peace May Also Be Recorder of City Court.—Under Const., Art. 14, § 7, excepting a justice of the peace from the inhibition against one holding two offices of trust or profit, one may be both a justice of the peace and the recorder of a city recorder's court. *State v. Lord*, 145 N. C. 479, 59 S. E. 656 (1907).

§ 7-120. **Validation of official acts of certain justices of the peace.**—Each and all of the official acts of justices of the peace appointed by chapter three hundred twenty-one, Public Laws of one thousand nine hundred thirty-one, performed after the expiration of their terms on April first, one thousand nine hundred thirty-seven, and before March twenty-first, one thousand nine hundred thirty-nine, including all judgments rendered, probates taken, marriages performed, and any and all other acts whatsoever, are hereby in all respects validated, ratified and confirmed. (1939, c. 268.)

ARTICLE 14A.

Appointment by Judge and Abolition of Fee System.

§ 7-120.1. **Determination by county commissioners of number of justices to be appointed.**—The board of commissioners of any county in the State, upon the adoption of a resolution on the first Monday in March, 1950, or any even-numbered year thereafter, shall, for the term beginning the first Monday in December thereafter, fix the number of justices of the peace to be appointed in such county, taking into consideration the population, the business then being transacted by justices of the peace in such county and the future business as may be reasonably anticipated, and having due regard for all other factors to the end that a sufficient number of justices of the peace are appointed to serve adequately the needs of the county and the various localities therein. (1949, c. 1091, s. 1.)

For brief discussion of article, see 27 N. C. Law Rev. 442.

§ 7-120.2. **Appointment and removal by the resident judge.**—The justices of the peace for each county adopting this article shall be appointed by the resident judge of the superior court of the district in which the county is sit-

uated. Any justice of the peace may, after due notice and hearing, be removed from office by such resident judge for misfeasance, malfeasance, nonfeasance or other good cause. (1949, c. 1091, s. 2.)

§ 7-120.3. **Term of office.**—The term of office of every justice of the peace appointed pursuant to this article shall be two years. The term shall commence on the first Monday in December, 1950, and biennially thereafter. (1949, c. 1091, s. 3.)

§ 7-120.4. **Salaries and fees.**—Each justice of the peace shall be paid an annual salary, to be fixed by the board of county commissioners, in its discretion, to be paid out of the general fund of the county. Such salary shall be in lieu of all fees as compensation for a justice of the peace in connection with any criminal or civil case, but he shall continue to collect such fees as are provided by law with respect to criminal or civil cases and pay them into the general fund of the county. Each such justice of the peace shall be permitted to collect and retain for his own use, in addition to the salary fixed by the county board of commissioners, all fees provided by law with respect to any matter other than a criminal or a civil case. (1949, c. 1091, s. 4.)

§ 7-120.5. **Deposits and reports.**—Every justice of the peace appointed pursuant to this article shall be subject to the provisions of G. S. § 153-135, known as the "Daily Deposit Law", and shall also make monthly reports to the board of county commissioners, showing in full detail all fees, fines and forfeitures collected by him, in such form and manner as the board may require. (1949, c. 1091, s. 5.)

§ 7-120.6. **Jurisdiction and places for holding court.**—Every justice of the peace shall have county-wide jurisdiction, but the board of commissioners shall designate the place or places where each justice of the peace shall sit regularly for the transaction of business, which place shall be so designated as to serve reasonably the convenience of the citizens of the county. The board of county commissioners shall provide adequate space or quarters, either in county buildings, or through renting appropriate space, or otherwise, in which each justice of the peace may hold court and perform the other duties of his office. (1949, c. 1091, s. 6.)

§ 7-120.7. **Vacancies.**—Any vacancy other than a vacancy arising by expiration of a term shall be filled by appointment by the clerk of the superior court of the county in which such vacancy occurs. (1949, c. 1091, s. 7.)

§ 7-120.8. **Expiration of terms of present justices; transfer of pending cases.**—In those counties accepting the provisions of this article, the terms of all persons holding the office of justice of the peace, other than those appointed pursuant to this article, shall expire on the first Monday after the adoption of the provisions of this article, and any case or proceeding pending on such date before any justice of the peace shall be transferred to a justice of the peace appointed pursuant to this article, in such manner as may be directed by the board of county commissioners. (1949, c. 1091, s. 8.)

§ 7-120.9. **Bond.**—Every justice of the peace appointed pursuant to this article, prior to assuming the duties of his office, shall furnish a bond payable to the county in and for which he is appointed, in such amount as the board of commissioners may determine, conditioned upon the faithful performance of his duties and upon a correct and proper accounting for all funds paid into his hands by virtue of or under color of his office. The premium on such bond shall be paid by the board of county commissioners out of the general fund of the county. (1949, c. 1091, s. 9.)

§ 7-120.10. **Counties exempt from article.**—This article shall not ap-

ply to the counties of Alamance, Alexander, Alleghany, Ashe, Avery, Beaufort, Bertie, Brunswick, Cabarrus, Caldwell, Carteret, Caswell, Catawba, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davidson, Davie, Duplin, Durham, Forsyth, Franklin, Gates, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hoke, Hyde, Jackson, Johnston, Jones, Lee, Lincoln, Macon, Madison, Martin, McDowell, Mitchell, Moore, Nash, New Hanover, Northampton, Pamlico, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Surry, Swain, Transylvania, Tyrrell, Union, Wake, Warren, Washington, Watauga, Wayne, Wilkes, Wilson, Yadkin and Yancey. (1949, c. 1091, s. 10.)

§ 7-120.11. **Conflicting laws repealed.**—Section 7-113, the last two sentences of § 7-114, and § 7-115, and all other laws and clauses of laws in conflict with this article are hereby repealed. (1949, c. 1091, s. 11.)

ARTICLE 15.

Jurisdiction.

§ 7-121. **Jurisdiction in actions on contract.**—Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—

1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.

2. Wherein the title to real estate is in controversy. (Const., art. 4, s. 27; Code, s. 834; Rev., s. 1419; C. S., s. 1473.)

I. Actions Ex Contractu.

II. Title to Land in Controversy.

Cross References.

See §§ 7-63, 7-124 and notes. As to petition of insolvent debtor before justice of peace for discharge from imprisonment, see §§ 23-25 through 23-27.

I. ACTIONS EX CONTRACTU.

In General.—Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by this section to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

Test of Jurisdiction.—See note to § 7-63, analysis line "Essentials" II, B.

Distribution of Jurisdiction Question of Procedure.—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

The jurisdiction of a justice of the peace is limited and special—not general—and he can only exercise the power conferred upon him by the Constitution, Art. IV, § 27, and statutes. He has no equitable powers. *Hopkins, v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644 (1943).

Concurrent Jurisdiction. — Although by

this section justices of the peace are given "exclusive" original jurisdiction in certain civil actions, other inferior courts are, by statute, given jurisdiction in civil actions concurrent with that of the justices of peace. For example, see article 28 of this chapter and §§ 7-279, 7-344, and 7-372.

Jurisdiction of Superior Court.—The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as \$200, proper jurisdiction being in the court of a justice of the peace. *Howard v. Mutual, etc., Life Ins. Ass'n*, 125 N. C. 49, 34 S. E. 199 (1899); *Sloan v. Carolina Cent. R. Co.*, 126 N. C. 487, 36 S. E. 21 (1900). See § 7-63 and notes.

Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the superior court and that of a justice of the peace arises, depending upon the amount involved, and whether the action is ex contractu or ex delicto, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. *Mitchem v. Pasour*, 173 N. C. 487, 92 S. E. 322 (1917).

Judgment a Contract.—A judgment is a contract within the meaning of this section. *Moore v. Nowell*, 94 N. C. 268 (1886).

Whether Action in Tort or on Contract. — To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where

the complaint alleges the wrongful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort within the original jurisdiction of the superior court under Const., Art. 4, § 27, and §§ 7-121 and 7-122, and not an action on contract within the jurisdiction of a justice of the peace under this section. *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515 (1928).

Counterclaims in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of set-off and recoupment as a bar to the plaintiff's demand. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

In an action before a justice of the peace for a sum due by note and within his jurisdiction, it was held, that a counterclaim consisting of an alleged indebtedness arising out of unadjusted partnership dealings between the parties, could not be allowed; the jurisdiction to settle such matters being in a court of equity. *Love v. Rhyne*, 86 N. C. 576 (1882).

Misjoinder of Causes. — Where two causes are set out and jurisdiction can be attached on only one, the justice of the peace may try that one, rejecting the other. *Railroad v. Hardware Co.*, 135 N. C. 73, 47 S. E. 234 (1904).

Breach of Warranty.—The complaint alleged in substance that plaintiff purchased a mare from defendant, that the defendant warranted the mare to be sound, that in fact the mare had defective eyesight, which was known to defendant, that plaintiff relied upon the representation that the mare was sound, and that plaintiff was damaged in the sum of \$125.00, and, as a second cause of action, alleged that as a result of the said wrongful act of defendant, plaintiff had been obliged to feed a worthless mare to his damage in the sum of \$100.00. The complaint fails to state a cause of action for fraud in that it fails to allege scienter, but states a cause of action for breach of warranty in the sum of \$125.00, which is within the exclusive original jurisdiction of a justice of the peace, the sum claimed for feeding the mare not being within the rule for the determination of the jurisdictional amount, and therefore defendant's demurrer to the action instituted in the superior court was properly sustained. *Hill v. Snider*, 217 N. C. 437, 8 S. E. (2d) 202 (1940).

Action for Penalty Plus Attorney's Fees.—Neither the Constitution nor any statutes enacted pursuant thereto, give jurisdiction to justices of the peace in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court. *Hopkins v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644 (1943).

Waiver of Tort.—Where property is tortiously taken and sold, the owner may waive the tort and maintain an action to recover the proceeds. *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711 (1896). See also note to § 7-63. See note of Winslow v. Weitt, 66 N. C. 432 (1872), under § 7-63, analysis line "In General," II, B, 1, (a).

Same—Construction.—When the plaintiff can bring his action either in tort or upon contract, the courts, in favor of jurisdiction, will sustain the election of the plaintiff. *White v. Eley*, 145 N. C. 36, 58 S. E. 437 (1907).

To sustain jurisdiction over the subject matter of an action, the court will liberally construe the pleadings in the pleader's favor, and where the question is whether a justice of the peace had jurisdiction in contract, and the movant contends the case was *ex delicto*, and that it was beyond the jurisdiction of the justice of the peace, the court will sustain its jurisdiction if it reasonably appears from the pleadings that it was tried as *ex contractu* in the justice's court. *Furniture Co. v. Clark*, 191 N. C. 369, 131 S. E. 731 (1926).

Indivisible Cause.—An indivisible cause of action cannot be split in order that separate suits may be brought for the various parts before a justice of the peace. *Norvell v. Mecke*, 127 N. C. 401, 37 S. E. 452 (1900).

Where a single contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to "split up" the account and recover upon each item. *Jarrett v. Self*, 90 N. C. 478 (1884).

Where the items of an account are incurred under different contracts an action may be brought on each item before a justice of the peace, the separate items being less than \$200. *Copeland v. Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501 (1904).

A creditor whose account consists of several items, either for goods sold or labor done at different times, each of which is for less than \$200, although the aggregate of the account exceeds \$200, may sue before a justice for any number of such items not exceeding \$200. *Boyle v. Robins*, 71 N. C. 130 (1874).

Want of Jurisdiction.—The court will *ex mero motu* take notice of the want of ju-

risdiction. *Hannah v. Richmond, etc., R. R.*, 87 N. C. 351 (1882).

Objection on Appeal.—When the pleadings before a justice of the peace, in an action on contract, did not show a want of jurisdiction and no objection was made thereto, such objection cannot be made on appeal to the superior court. *Cromer Bros. v. Marsha*, 122 N. C. 563, 29 S. E. 836 (1898).

Amount Demanded Controlling.—The justice of the peace has jurisdiction of an action upon contract where the summons used as a complaint demands, in good faith, a recovery of \$200 or less, though a greater sum could have been demanded. *Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537 (1902); *Shoe Co. v. Wiseman*, 174 N. C. 716, 94 S. E. 452 (1917). The aggregate sum demanded in good faith is the test of the jurisdiction of the court, though this aggregate is made up of several causes of action. *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232 (1892). For treatment of the amount as fixing jurisdiction and the good faith, etc., required, see notes under § 7-63, analysis line, "Essentials," II, B.

In an action on contract it is the sum demanded in the summons or complaint that fixes the jurisdiction. *Cromer Bros. v. Marsha*, 122 N. C. 563, 29 S. E. 836 (1898).

Principal and Interest.—The Constitution and this section limit the jurisdiction of justices of the peace in actions upon contract, to where the sum demanded does not exceed two hundred dollars, exclusive of interest; and a justice of the peace has no jurisdiction in an action to recover the balance of the principal due upon a note and interest on the original amount of the note when the original amount thereof exceeded the sum named. *Riddle v. Bridgewater Milling Co.*, 150 N. C. 689, 64 S. E. 782 (1909).

Equitable Causes.—A justice of the peace has no jurisdiction to administer or enforce an equitable cause of action. *Wilson v. Life Ins. Co.*, 155 N. C. 173, 71 S. E. 79 (1911).

A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

Same—Appeal.—When the plaintiff seeks only equitable relief in a court of a justice of the peace, no jurisdiction can be acquired over the subject matter by the superior court on appeal, the proceedings being void ab initio. *Wilson v. Life Ins. Co.*, 155 N. C. 173, 71 S. E. 79 (1911).

Applied in Miles Co. v. Powell, 205 N. C. 30, 169 S. E. 828 (1933).

II. TITLE TO LAND IN CONTROVERSY.

Cross Reference.—See § 7-124 and sections following and notes thereto.

Jurisdiction.—Justices of the peace can take no jurisdiction over a cause in which title to land is in controversy. *Brown v. Southerland*, 142 N. C. 225, 55 S. E. 108 (1906). They are prohibited by the Constitution as well as impliedly by this section. *Forsythe v. Bullock*, 74 N. C. 135 (1876).

Where, under a will devising all of testator's land to his wife, remainder to his nephew (the plaintiff) in fee, except fifty acres in some suitable place and on certain conditions to defendant, and defendant had settled on fifty acres, claiming title thereto as being in a suitable place and conditions having been performed, an action by plaintiff for possession involves the title to land and is not within the jurisdiction of a justice of the peace. *Wright v. Harris*, 116 N. C. 460, 21 S. E. 693 (1895).

Mere allegation of the defendant that title is in controversy will not oust justice's jurisdiction. The matter must appear from the evidence or admission of the parties. *Jerome v. Setzer*, 175 N. C. 391, 95 S. E. 616 (1918).

Title Must Be between Parties to Action.—The question of title, which arrests further proceedings before the justice must be one between the original parties to the action; and jurisdiction once acquired cannot be divested by the intervention of a stranger to the suit, asserting a paramount title in himself. *Davis v. Davis*, 83 N. C. 71 (1880).

Action Dismissed Judgment for Costs.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. *Edwards v. Cowper*, 99 N. C. 421, 6 S. E. 792 (1888); *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799 (1903).

Notes Given for Purchase Price of Land.—A justice of the peace has jurisdiction of an action to recover a balance due on a note given for the purchase money of land. *McPeters v. English*, 141 N. C. 491, 54 S. E. 417 (1906).

Notes on Contract to Convey Land.—A justice of the peace has jurisdiction of an action on a note given for a contract to convey land, the only defense being payment. *Patterson v. Freeman*, 132 N. C. 357, 43 S. E. 904 (1903).

Recovery of Portion of Crop as Rent.—In an action to recover one-third of the crops due as rent under an alleged contract

of lease, which the jury found to exist, a justice of the peace had jurisdiction, as the title to land was not involved. *Durant v. Taylor*, 89 N. C. 351 (1883).

Action between Mortgagor and Mortgagee.—In an action to recover land the jurisdiction of the justice is excluded where the relation is that of mortgagor and mortgagee or vendor and vendee. *Hughes v. Mason*, 84 N. C. 473 (1881).

Foreclosure of Mortgage.—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

Landlord and Tenant Act.—A court of a justice of the peace has no jurisdiction under the landlord and tenant act to try title to land. And where it appears that title is involved or that there are equities involved as to the land a justice of the peace has no jurisdiction. *Parker v. Allen*, 84 N. C. 466 (1881).

That the vendee, in a contract for the sale of land, remained silent, when the contract was mutilated under the direction of the vendor, is not sufficient evidence of a change of the relations from vendor and vendee to landlord and tenant, to give a

justice of the peace jurisdiction of an action to summarily eject the defendant vendee. *Boone v. Drake*, 109 N. C. 79, 13 S. E. 724 (1891).

In an action by a purchaser of land with warranty to recover a sum of money paid by him to free the land from a lien, the deed will be introduced to prove the covenants, the title to realty will be involved, and a justice would not have jurisdiction. *Hann v. Fletcher*, 189 N. C. 729, 128 S. E. 328 (1925).

Rule of Estoppel Gives Justice Jurisdiction.—The rule which estops a tenant to deny his landlord's title precludes all controversy as to the title in summary proceedings by the landlord, and thus gives a justice of the peace jurisdiction. *Credle v. Gibbs*, 65 N. C. 192 (1871); *Davis v. Davis*, 83 N. C. 71 (1880).

In a proceeding before a justice of the peace under the Landlord and Tenant Act, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. *Heyer v. Beatty*, 76 N. C. 28 (1877).

Penalty.—The title to land is not in controversy in a proceeding to recover a penalty prescribed by a town charter for obstructing a street. *Henderson v. Davis*, 106 N. C. 88, 11 S. E. 573 (1890).

§ 7-122. Jurisdiction in actions not on contract. — Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars. (Const., art. 4, s. 27; Code, s. 887; Rev., s. 1420; C. S., s. 1474.)

Cross Reference.—See §§ 7-63, 7-121 and notes.

Editor's Note.—Section 7-63 sets out the limits wherein the superior court exercises its original jurisdiction. This section gives the justices of the peace concurrent jurisdiction over certain classes of cases. These cases are also cognizable in the superior court since the jurisdiction herein given to the justices of the peace is not exclusive, and hence they fall within what may be termed the residuary clause contained in § 7-63.

Generally.—In actions *ex contractu* justices of the peace have jurisdiction, when the sum demanded does not exceed two hundred dollars, but in actions *ex delicto*, their jurisdiction is limited to cases wherein the value of the property does not exceed fifty dollars. *Noville v. Dew*, 94 N. C. 43 (1886).

Justices of the peace have concurrent jurisdiction with the superior courts of actions for torts where the value of the prop-

erty in controversy does not exceed fifty dollars. *Harvey v. Hambricht*, 98 N. C. 446, 4 S. E. 187 (1887).

It is said in *Duckworth v. Mull*, 143 N. C. 461, 55 S. E. 850 (1906), "We think that the decisions of this court, already made, lead necessarily to the conclusion that the clause of this section comprehends, and was intended to comprehend, all actions *ex delicto*; that the term, 'property in controversy,' here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and where a plaintiff, in good faith, states or limits his demand in actions of this character at fifty dollars or less, the justice, as provided by the statute, has jurisdiction concurrent with the superior court to hear and determine the matter."

Damages.—A justice of the peace has jurisdiction of an action for damages not exceeding fifty dollars, and for injury to personal property, though such property

be of greater value than fifty dollars. *Malloy v. City*, 122 N. C. 480, 29 S. E. 880 (1898).

Jurisdiction Essential.—A judgment rendered by a justice of the peace in an action in which he has no jurisdiction is void. *Noville v. Dew*, 94 N. C. 43 (1886).

Remittance of Excess Will Not Give Jurisdiction.—Where, in an action of claim and delivery, it appears that the value of the property exceeds fifty dollars, it at least ousts the jurisdiction of the justice, and the plaintiff cannot confer jurisdiction by a remitter. *Noville v. Dew*, 94 N. C. 43 (1886). See § 7-63, analysis line II, B, 1, b.

Priority of Proceedings as Determining Jurisdiction.—Where two or more courts have equal and concurrent jurisdiction of a case, that court in which suit is first brought acquires jurisdiction of it, which excludes the jurisdiction of the other courts. *Childs v. Martin*, 69 N. C. 126 (1873).

Irregular Proceedings.—Where jurisdiction is concurrent, and a case is carried by appeal to the superior court, and the appellant files an answer under leave of the court and goes to trial without objection, the court will have cognizance of the matter by virtue of its original jurisdiction

of the subject matter of the action, and by the consent the parties thus manifested, however irregular the proceedings may have been in the justice's court. *Boing v. Raleigh & Gaston R. Co.*, 87 N. C. 360 (1882).

Waiver on Appeal.—Plaintiff brought suit in the court of a justice of the peace claiming a debt of fifty dollars, and also possession of a horse and wagon, under a certain mortgage. On appeal from the justice's judgment to the superior court plaintiff offered to remit his claim for the personal property and declare only for the debt. It was held, that he had a right to take such a course in his discretion, and that his honor erred in denying him that privilege. *Jones v. Palmer*, 83 N. C. 303 (1880).

Affidavit of Justice Not Conclusive.—Where the record of the justice of the peace has been lost, and only the judgment showing a recovery of the jurisdictional amount *ex contractu* appears in the trial on appeal, upon defendant's motion to dismiss for want of jurisdiction, an affidavit of the justice to the effect that the action was in tort is not conclusive. *Furniture Co. v. Clark*, 191 N. C. 369, 131 S. E. 731 (1926).

§ 7-123. Action dismissed for want of jurisdiction; remitter.—Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess." (1868-9, c. 159, s. 3; 1876-7, c. 63; Code, s. 835; Rev., s. 1421; C. S., s. 1475.)

Excess Remitted.—Where the amount recovered exceeds \$200, the justice has jurisdiction if the plaintiff remits the excess. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836 (1898); *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724 (1912).

It is only when the principal sum demanded exceeds \$200, that the plaintiff is required to remit the excess above that amount in order to give the justice jurisdiction. *Brantley v. Finch*, 97 N. C. 91, 1 S. E. 535 (1887).

Effect of Remittitur Where Jurisdiction Entirely Derivative.—Where a counterclaim, filed to an action brought before a justice, amounted to more than \$200.00, the want of jurisdiction as provided by this section could not be cured by entering a remittitur for the excess in the superior court, as the jurisdiction of the superior

court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the superior court can derive none by amendment. *Perry v. Pulley*, 206 N. C. 701, 175 S. E. 89 (1934).

Failure to Use Statutory Formula.—Objection to a failure to use the formula provided in this section should be made in the justice's court. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836 (1898).

Waiver.—The plaintiff having remitted the amount of damages arising on contract in excess of \$200, so as to confer jurisdiction on the court of a justice of the peace, and having taken a voluntary nonsuit in the superior court on defendant's appeal, is deemed to have waived the excess so remitted in his action on the same contract brought in the superior court, and his re-

covery is limited to the amount sued for in the justice's court. *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724 (1912).

Remittance of Counterclaim on Appeal.—The jurisdiction of the superior court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the superior court can derive none by amendment. So, where a counterclaim, filed to an action brought before a justice, amounted to more than \$200, the want of jurisdiction could not be cured by entering a remittitur for the excess in the superior court. *James v. McClamroch*, 92

N. C. 362 (1885).

Justice Has Jurisdiction to Recover Salary Which Failed to Equal Amount Stipulated in the "President's Re-Employment Agreement."—A justice of the peace has jurisdiction of an action on contract to recover the amount by which the salary paid plaintiff failed to equal the amount stipulated in the "President's Re-Employment Agreement," voluntarily signed by defendant employer, when the amount demanded does not exceed two hundred dollars. *James v. Sartin Dry Cleaning Co.*, 208 N. C. 412, 181 S. E. 341 (1935).

§ 7-124. **Title to real estate in controversy as a defense.**—In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. (Code, s. 836; Rev., s. 1422; C. S., s. 1476.)

Cross Reference.—See § 7-121 and note.

Answer in Writing Necessary.—The title to real estate cannot be drawn into controversy by the defendant on a trial in a justice's court except by delivering to the justice an answer in writing that such title will come in question. *Evans v. Williamson*, 79 N. C. 87 (1878).

The evidence at the trial must tend to show that the title is in issue. *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799 (1903). And the trial will proceed until it is apparent that this is true. *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677 (1899).

Mere Allegation of Defendant that Title Is in Controversy.—See note of *Jerome v. Setzer*, 175 N. C. 391, 95 S. E. 616

(1918), under § 7-121, analysis line II.

Judgment in Action in Which Defenses Should Have Been Set Up as Bar to Subsequent Action Thereon.—A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, and in the superior court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject matter of the action. *Ogburn v. Booker*, 197 N. C. 687, 150 S. E. 330 (1929).

§ 7-125. **Title to real estate in controversy, action dismissed.**—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. (Code, s. 837; Rev., s. 1423; C. S., s. 1477.)

Cross Reference.—See §§ 7-121, 7-124 and notes.

"Real Estate" Defined.—The words "real estate" in this section mean freehold estate. *Foster v. Penry*, 77 N. C. 160 (1877).

Allegation in Writing Not Required.—It is not necessary that an allegation in writing that the title to real estate is in controversy be made. *Edwards v. Cowper*, 99 N. C. 421, 6 S. E. 792 (1888). But the trial will proceed until it is apparent from the evidence that the question of title is in-

involved. *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677 (1899).

Duty of Justice to Dismiss Action.—When it appears on the trial that the title to real estate is in controversy, it is the duty of the justice to dismiss the action. *Hudson v. Hodge*, 139 N. C. 308, 51 S. E. 955 (1905).

Stated in Nesbit v. Turrentine, 83 N. C. 536 (1880); *Wright v. Harris*, 116 N. C. 460, 21 S. E. 693 (1895).

§ 7-126. **Another action in superior court.**—When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for

the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court. (Code, s. 838; Rev., s. 1424; C. S., s. 1478.)

Purpose of Section.—The last clause of this section was passed to prevent the hardship, which would necessarily arise if a defendant could have an action dismissed by a magistrate on his plea that title to real estate is in question, and then, when suit is brought by the same plaintiff for the same cause of action in the superior court, he should be allowed to plead that title to the land did not come in controversy, and have the cause dismissed there. To prevent such absurdity this statute was passed, so that if, on defendant's motion, it is adjudged in the magistrate's court that title to real estate will come in controversy, such finding shall be conclusive between same parties in the new action. *Peck v. Culberson*, 104 N. C. 425, 10 S. E. 511

(1889).

Dismissal upon Answer Essential.—Recourse may not be had to the provisions of this section where it does not appear that the action before the justice was dismissed upon answer and proof by defendant that the title to real estate was in controversy. *Brown v. Southerland*, 142 N. C. 225, 55 S. E. 108 (1906). See also, note of *Evans v. Williamson*, 79 N. C. 87 (1878), under § 7-124.

Where, however, there is a failure to file the written answer with the justice, the defendant is not estopped from filing such answer in the superior court and denying jurisdiction. *Evans v. Williamson*, 79 N. C. 87 (1878).

§ 7-127. **Justice may act anywhere in county.**—A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed. (Code, s. 824; Rev., s. 1425; C. S., s. 1479.)

Local Modification. — Caldwell: 1951, c. 608.

Issuance of Process When Justice Out of Township.—A justice may issue process

while he is anywhere in his county, provided he hears the matter in his own township. Dictum in *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815 (1896).

§ 7-128. **Punishment for contempt in certain cases.**—If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars. (1741, c. 30, P. R.; R. C., c. 115; Code, s. 848; Rev., s. 1426; C. S., s. 1480.)

Cross References.—As to courts and officers empowered to punish for contempt, see § 5-6. As to acts punishable as for contempt, see § 5-8. As to penalty of wit-

ness refusing to testify in action against railroad before a justice of peace, see § 7-146.

§ 7-129. **Jurisdiction in criminal actions.**—Justices of the peace have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law does exceed a fine of fifty dollars or imprisonment for thirty days: Provided, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: Provided further, that nothing in this section shall prevent the superior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given to justices of the peace if some justice of the peace, within twelve months after the commission of the offense, shall not have proceeded to take official cognizance of the same. (Const., art. 4, s. 27; Code, s. 892; 1889, c. 504, s. 2; Rev., s. 1427; C. S., s. 1481.)

Cross References.—As to jurisdiction of justice of peace to require defendant to enter recognizance to keep the peace, see §

15-32. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note. — This section must be construed in connection with § 7-63 which defines the jurisdiction of the superior court in criminal matters. See *State v. Cunningham*, 94 N. C. 824 (1886), and note of case under § 7-63, analysis line, "Criminal Actions," IV.

Generally. — Until the expiration of six months (now twelve) from the commission of the offense justices of the peace have exclusive jurisdiction of all misdemeanors where the punishment cannot exceed a fifty-dollar fine or thirty days imprisonment; after the expiration of that their jurisdiction is concurrent with that of the superior court. *State v. Roberts*, 98 N. C. 756, 3 S. E. 682 (1887).

Concurrent Jurisdiction. — In criminal actions, as in civil actions, although the justice of the peace has been given "exclusive" original jurisdiction in certain instances, other courts have been granted jurisdiction concurrent with that of the justice of the peace. See, for example, §§ 7-190 and 7-222.

Constitutionality. — This section is constitutional. *State v. Johnson*, 64 N. C. 581 (1870).

Legislative Power. — It is not competent for the legislature to confer jurisdiction upon magistrates of any offense of which the punishment by law may exceed the limit as fixed by this section (and the Constitution). *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14 (1891).

Where Punishment Unlimited. — Where the punishment under the particular statutes under which the defendant is being tried is unlimited or is not limited to a fine of \$50, or imprisonment for thirty days, it is not a case within the jurisdiction of a justice of the peace. *State v. Addington*, 121 N. C. 538, 27 S. E. 988 (1897).

Pleading. — In the case falling within the provisions of this section the pleadings must show affirmatively everything necessary to confer the jurisdiction relied upon. *State v. Johnson*, 64 N. C. 581 (1870).

Same—When Jurisdiction Concurrent. — It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the superior court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission" for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. *State v. Smith*, 157 N. C. 578, 72 S. E. 853 (1911).

Variance between Indictment and Proof as Affecting Jurisdiction. — See note to *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14 (1891), § 7-63, analysis line, "Criminal Actions," IV.

"Deadly Weapon." — A deadly weapon is not one that must kill or that may kill, but it is one which would likely produce death or great bodily harm when used by the defendant in the manner in which it was used. *State v. Sinclair*, 120 N. C. 603, 27 S. E. 77 (1897).

It is material to show whether or not a deadly weapon was used because it is a determining factor in deciding which court has jurisdiction. *State v. Murphy*, 101 N. C. 697, 8 S. E. 142 (1888).

Same — Question of Law or Fact. — Whether the weapon used is a deadly weapon is a question of law, where there is no dispute about the facts. *State v. Sinclair*, 120 N. C. 603, 27 S. E. 77 (1897). But where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it was used, it is proper and necessary, to submit the matter to the jury with proper instructions. *State v. Archbell*, 139 N. C. 537, 51 S. E. 801 (1905).

"Serious Damage." — The serious injury as used in this section must be such physical injury as gives rise to great bodily pain; mental anguish alone is not serious injury within the meaning of this provision. *State v. Nash*, 109 N. C. 824, 13 S. E. 874 (1891).

Where it was shown that the defendant assaulted the prosecuting witness with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and badly injuring his eyes, but it did not appear that the injuries were permanent, it was held, that this was "serious damage," and a justice of the peace had no jurisdiction of the offense. *State v. Shelly*, 98 N. C. 673, 4 S. E. 530 (1887).

Same—Manner of Excepting. — Exception to the jurisdiction of the superior court, or that no serious damage was done, or no deadly weapon was used, and six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instruction to the jury to acquit. *State v. Earnest*, 98 N. C. 740, 4 S. E. 495 (1887). And it may be also taken advantage of under a plea of not guilty. *State v. Berrv*, 83 N. C. 60 (1880); *State v. Reaves*, 85 N. C. 553 (1881).

Simple Assault. — In a case of simple assault where no deadly weapon is used and no serious damages inflicted, a justice of

the peace has jurisdiction. *State v. Johnson*, 94 N. C. 863 (1886).

Upon the trial of an indictment for simple assault, the superior court *prima facie* has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. *State v. Earnest*, 98 N. C. 740, 4 S. E. 495 (1887).

Same—Former Conviction and Acquittal.

—A plea of former conviction or acquittal before a justice of the peace for a simple assault is a complete defense on a trial for the same offense in the superior court, unless it should appear in the latter that the defendant making the plea had, in fact,

used a deadly weapon or inflicted serious injury, in which case, the justice not having jurisdiction, the proceedings before him would be a nullity. *State v. Albertson*, 113 N. C. 633, 18 S. E. 321 (1893).

Under this section a magistrate has original jurisdiction of simple assault and on appeal from an acquittal a plea of former jeopardy is good. *State v. Myrick*, 202 N. C. 688, 163 S. E. 803 (1932).

Cited in *State v. Hefner*, 199 N. C. 778, 155 S. E. 879 (1930); *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943); *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943), (con. op.); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394 (1946).

ARTICLE 16.

Dockets.

§ 7-130. Justice shall keep docket.—A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice. (Code, s. 831; Rev., s. 1416; C. S., s. 1482.)

Not a Court of Record. — A justice's court is not a court of record. *Williams v. Bowling*, 111 N. C. 295, 16 S. E. 176 (1892); *Smith Building, etc., Co. v. Pender*, 173 N. C. 55, 91 S. E. 524 (1917).

This has been the ruling in a great number of cases but in *Harris v. Singletary*, 193 N. C. 583, 137 S. E. 724 (1927), it is intimated that under the requirements of this section, a justice's court is partly one of record.

While the court of a justice of the peace is not a court of record, nevertheless, its judgments are conclusive until reversed,

modified or vacated in some proceeding instituted for that purpose; and such court has the same jurisdiction to hear applications to vacate judgments rendered by it as superior courts possess over judgments rendered by them. *Whitehurst v. Transportation Co.*, 109 N. C. 342, 13 S. E. 937 (1891).

While the courts of justices of the peace are not, strictly speaking, courts of record, they possess and may exercise many of the powers of such tribunals. *Bailey v. Hester*, 101 N. C. 538, 8 S. E. 164 (1888).

§ 7-131. Entries to be made.—The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings, or on any other paper in the cause. (Code, s. 840, Rule 13; Rev., s. 1470, Rule 14; C. S., s. 1483.)

Time of Docketing. — A judgment of a justice of the peace, not docketed within a year from the date of its rendition, is dormant and its lost validity can not be re-

stored by docketing the same in the superior court, but only by a new action upon it. *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645 (1894).

§ 7-132. Dockets filed with clerk.—Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county. (Code, s. 827; Rev., s. 1417; C. S., s. 1484.)

§ 7-133. Dockets, papers, and books delivered to successor.—When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought

before such successor. (Code, s. 828; 1885, c. 372; Rev., s. 1418; C. S., s. 1485.)

ARTICLE 17.

Fees.

§ 7-134. **Fees of justices of the peace.**—Justices of the peace shall receive the following fees, and none other: For attachment with one defendant, twenty-five cents, and if more than one defendant, ten cents for each additional defendant; transcript of judgment, ten cents; summons, twenty cents, if more than one defendant in the same case, for each additional defendant, ten cents; subpoena for each witness, ten cents; trial when issues are joined, seventy-five cents, and if no issues are joined, then a fee of forty cents for trial and judgment; taking an affidavit, bond or undertaking, or for an order of publication, or an order to seize property, twenty-five cents; for jury trial and entering verdict, seventy-five cents; execution, twenty-five cents; renewal of execution, ten cents; return to an appeal, thirty cents; order of arrest in civil actions, twenty-five cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, fifty cents; warrant of commitment, twenty-five cents; taking depositions on order or commission, per one hundred words, ten cents; garnishment for taxes, and making necessary return and certificate of same, twenty-five cents; for hearing petition for widow's year's allowance, issuing notice to commissioners and allotting the same, one dollar; for filing and docketing laborers' liens, fifty cents; probate of a deed or other writing proved by a witness, including the certificate, twenty-five cents; probate of a deed or other writing executed by a married woman, proper acknowledgment and private examination, with the certificate thereof, twenty-five cents; probate of a deed or other writing acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof, twenty-five cents; probating chattel mortgage, including the certificate, ten cents; for issuing all papers and copies thereof in an action for claim and delivery, and the trial of the same, if issues are joined, when there is one defendant, one dollar and fifty cents, and if more than one defendant in action, fifty cents for each additional defendant, and ten cents for each subpoena issued in said cause, and twenty-five cents for taking the replevy bond, when one is given: Provided, that when the trial of such a cause shall have been removed from before the justice of the peace issuing the said papers, the justice of the peace sitting in trial of such cause shall receive fifty cents of the above costs for such trial and judgment.

Justices of the peace in the counties of Alamance, Alexander, Anson, Bertie, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Chatham, Cherokee, Chowan, Clay, Columbus, Cumberland, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gates, Granville, Greene, Halifax, Harnett, Haywood, Henderson, Hertford, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, McDowell, Macon, Madison, Mitchell, Montgomery, Nash, Northampton, Onslow, Orange, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rowan, Stanly, Stokes, Swain, Transylvania, Tyrrell, Vance, Wake, Watauga, Wayne, Wilkes and Yadkin shall receive the following fees, and none other: For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each additional defendant, fifteen cents; subpoena for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or undertaking, or for an order of publication, or an order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution, fifteen cents; return to an appeal, forty cents; order of arrest in civil actions, thirty cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty

cents; taking depositions on order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (1870-1, c. 130, s. 9; 1883, c. 368; Code, ss. 2135, 3748; 1885, c. 86; 1903, c. 225; Rev., s. 2788; 1907, c. 967; 1917, c. 260; C. S., s. 3923; 1921, c. 113; Ex. Sess. 1921, cc. 38, 64, 67; 1923, cc. 28, 114, 238; 1929, cc. 13, 59; 1931, cc. 51, 303; 1945, c. 150; 1947, c. 337.)

Local Modification. — Catawba: 1949, c. 348; Davidson: 1949, c. 643; Franklin: 1945, c. 167; 1949, c. 258; Granville: 1945, c. 1066; Haywood: 1947, c. 687; Henderson: 1941, c. 324; Jackson: 1949, c. 252; Jones: 1943, c. 313, § 2; Lincoln: 1947, c. 138; Orange: 1935, c. 358; Polk: 1949, c. 729; Randolph: 1947, c. 337; Robeson: 1949, c. 619; Transylvania: 1947, c. 1003; Wake: 1937, c. 136; 1941, c. 165; 1951, c. 866; Warren: 1937, c. 187; Watauga: 1947, c. 983.

Editor's Note. — The 1929 amendment added Caldwell and Onslow to the list of

counties in the second paragraph; the 1931 amendment added Cumberland and Madison; and the 1945 amendment added Yadkin. The 1947 amendment struck out Randolph from the list.

The fee of the recorder of a city who is ex officio justice of the peace for the trial of an offense should, in proper instances, be taxed against the defendant as a part of the costs, upon the trial in the superior court, upon appeal. *State v. Lord*, 145 N. C. 479, 59 S. E. 656 (1907).

ARTICLE 18.

Process.

§ 7-135. **Action begun by summons.**—Civil actions in these courts shall be commenced by the issuing of a summons. (1868-9, c. 159, s. 9; Code, s. 830; Rev., s. 1444; C. S., s. 1486.)

Cross Reference. — As to summons and process generally, see § 1-88 et seq.

Service by Publication. — In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the

court has been levied on, a summons is not required. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915). As to service by publication generally, see § 1-98 and the notes thereto.

§ 7-136. **Issuance and contents of summons.**—The summons shall be issued by the justice and signed by him. It shall run in the name of the State, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum demanded by the plaintiff or the value of the property sued for, where specific property is claimed. (1874-5, c. 234; Code, s. 832; Rev., s. 1445; C. S., s. 1487.)

To Whom Directed. — The summons in a civil action before a justice of the peace must be directed to "any constable or other lawful officer." *McKee v. Angel*, 90 N. C. 60 (1884).

Special Officer.—A special officer may be deputized to serve the summons issued by a justice of the peace, where the sheriff and coroner are interested. *Baker v. Brem*, 127 N. C. 322, 37 S. E. 454 (1900).

Signing.—Where a justice of the peace, because of bad eyesight, requests his secretary to sign his name to the summons, which she does in his presence and under his supervision, the summons is valid, and when the summons is issued in an action in arrest and bail and defendant therein is later arrested upon return of

execution against his property unsatisfied, the manner of the issuance of the summons will not support an action for false imprisonment. *Johnson v. Chambers*, 219 N. C. 769, 14 S. E. (2d) 789 (1941).

Amount Must Be Stated.—In an action before a justice of the peace, if on contract, the summons should state the amount demanded, if for a tort, it should state the amount of damages claimed, and if for the recovery of specific property, the value of the property, and such statement in the summons gives the justice prima facie jurisdiction. *Noville v. Dew*, 94 N. C. 43 (1886). A defect in this particular will not be cured by the insertion of the necessary averment in the plead-

ings or other process. *Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783 (1888).

Same—Omission by Inadvertence.—Where it is made to appear that the court would have jurisdiction if the summons had contained the proper allegation, but it was omitted by mistake or inadvertence, it may, pending the action, permit the necessary amendment. *Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783 (1888).

Same—Conclusiveness as Fixing Jurisdiction.—Where the amount claimed in the summons issued by a justice was \$200, and no other complaint was filed, and the amount offered in evidence amounted to \$242, but the plaintiff stated that he remitted the excess over \$200, it was held that the justice had jurisdiction. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836 (1898). See § 7-63, analysis line, "Previous Remission," II, B, 1, b.

Failure to Serve Summons.—Where a justice issued a summons and warrant of

attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of summons. *Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61 (1901).

After Thirty Days.—When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days subsequent to service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915).

Presumption as to True Date.—A summons is presumed to bear the true date of its issue, but it is competent to show that it was not in fact then issued. *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476 (1896).

§ 7-137. Service and return of summons.—The officer to whom the summons is delivered shall execute the same within five days after its receipt by him or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same. (Code, s. 833; Rev., s. 1446; C. S., s. 1488.)

Cross References.—See §§ 7-136, 7-137 and notes. As to summons and process generally, see § 1-88 et seq., and notes.

In General.—The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace, must be observed by the process officer as from the superior court, § 7-149, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid,

and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in the court of the justice of the peace. *Pass v. Elias*, 192 N. C. 497, 135 S. E. 291 (1926).

To Whom Returnable.—A summons issued by one justice of the peace cannot be made returnable before another (except in cases of bastardy). *Williams v. Bowling*, 111 N. C. 295, 16 S. E. 176 (1892).

§ 7-138. Process issued to another county.—No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides. (1876-7, c. 287; Code, s. 871; Rev., s. 1447; C. S., s. 1489.)

In General.—This section being a restricted legislative grant of power when exercised, must be strictly pursued. *Durham, etc., Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411 (1898). See also, *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799 (1891).

The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defend-

ants as parties. In certain cases, perhaps, it may be so plain that the plaintiff has no real or bona fide claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. *Marler v. Wadesboro Clothing Co.*, 150 N. C. 519, 64 S. E. 366 (1909).

Amendment as to Resident Defendant.—Where the summons was issued against a resident of a county and a nonresident of the county, and on the trial the sum-

mons was amended on striking out the name of the resident defendant, it was held, that the justice should dismiss the action. *Wooten v. Maulsby*, 69 N. C. 462 (1873).

To Whom Addressed.—When a justice of the peace issues process for nonresident defendants, it must be issued (addressed) to the officer of the county where it is to be served. *Durham, etc., Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411 (1898).

Foreign Corporations.—The provisions

of this section do not apply to foreign corporations. *Fleming Co. v. Southern R. R.*, 145 N. C. 37, 58 S. E. 793 (1907).

The Municipal Court of Greensboro has no jurisdiction under Chapter 126, Private Laws of 1931, to determine a cause upon a contract, involving less than \$200.00, when the sole defendant is not a resident of Guilford County and summons is served in Lee County as this section and § 7-139 are applicable. *Miles Co. v. Powell*, 205 N. C. 30, 169 S. E. 828 (1933).

§ 7-139. Civil process in inferior courts.—The process of any recorder's court, county court, or other court inferior to the superior courts of the State, when such court is exercising the jurisdiction of a justice of the peace in civil matters, shall run only as does the process of the court of a justice of the peace for the county in which such court is located. (1915, c. 19; C. S., s. 1490.)

Cross Reference.—As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92, 1-93.

§ 7-140. Endorsement of process to another county.—In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to endorse his name on the same, or a duplicate thereof, and such process so endorsed shall be executed in like manner as if it had been originally issued by the justice endorsing it. (Code, s. 872; Rev., s. 1449; C. S., s. 1491.)

To Whom Addressed.—See note of *Durham, etc., Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411 (1898), under § 7-138.

§ 7-141. Certificate of clerk on process for another county.—In all cases referred to in § 7-140 it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued. (1870-1, c. 60, s. 2; Code, s. 873; Rev., s. 1450; C. S., s. 1492.)

Cross Reference.—See §§ 7-188, 7-190, and notes.

§ 7-142. Judgment against defendant in another county.—No justice of the peace shall enter a judgment under §§ 7-140 and 7-141 against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same. (1876-7, c. 57; Code, s. 874; Rev., s. 1451; C. S., s. 1493.)

Section Not Jurisdictional.—The provision of this section, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the pur-

pose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed. *Bank v. Carlile*, 174 N. C. 624, 94 S. E. 297 (1917).

Application.—This section applies only where a justice's summons has been is-

sued against a defendant residing in another county. Williams v. Iron Belt, etc., Association, 131 N. C. 267, 42 S. E. 607 (1902).

§ 7-143. Service on foreign corporation. — Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in the State, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served: Provided, that when any foreign corporation has no process agent in this State, but has an agent who collects money for it, said agent shall be deemed a process agent within the terms of this section, and that this proviso shall apply to existing claims as well as those arising hereafter. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides in this State, or when it cannot be made personally within the State upon the president, treasurer, or secretary thereof. (Rev., s. 1448; 1907, c. 473; C. S., s. 1494; Ex. Sess. 1920, c. 28.)

Cross References.—As to agents on whom service can be had, see § 1-97. See also §§ 55-58, 58-153 and notes.

Editor's Note.—The last provision of this section is new with the 1920 amendment.

Service on Agent Valid.—Under the provision of this section, a summons is-

sued to a foreign corporation in another county where it has a process agent, properly certified under seal of the clerk of the superior court, served on such corporation or the agent more than twenty days before the return day, is valid. Fleming Co. v. Southern R. R., 145 N. C. 37, 58 S. E. 793 (1907).

§ 7-144. Attendance of witnesses.—The justice, on application of either party, shall, by a subpoena or by an order in writing, on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness failing to appear shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend. (Code, s. 847; Rev., s. 1452; C. S., s. 1495.)

Cross Reference.—As to power to punish for contempt, see §§ 5-6, 5-8.

In General.—The power to punish for contempt is inherent in all courts and is essential to their existence. State v. Aiken, 113 N. C. 651, 18 S. E. 690 (1893).

Duty to Attend Court.—The duty of attending court in obedience to a subpoena

is incident to citizenship. State v. Massey, 104 N. C. 877, 10 S. E. 608 (1889).

No Bond Authorized.—A justice of the peace is not authorized to put a witness under bond to appear at a subsequent trial before the justice. Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191 (1901).

§ 7-145. Subpoena issued to another county.—Justices of the peace, in all civil cases, may issue subpoenas to counties other than their own; such subpoenas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties

other than their own under such subpoena they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpoenas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of the witness to and returning from place of trial, which amount shall be paid to the witness on his attendance and taxed against the party cast in the trial. (1893, c. 436; Rev., s. 1453; C. S., s. 1496.)

§ 7-146. Subpoena duces tecum in case against railroad.—When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpoena to any county within the limits of the State, commanding the president or any officer, director, agent, or any one in the employment of such company, to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper, and to give evidence in said cause; and each witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1885, c. 221, s. 2; Rev., s. 1454; C. S., s. 1497.)

ARTICLE 19.

Pleading and Practice.

§ 7-147. Removal of case.—In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable shall, upon written request made by either party to the action before evidence is introduced, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township; but no cause shall be more than once removed. (1880, c. 15; 1883, c. 66; Code, s. 907; Rev., s. 1455; 1917, c. 48; C. S., s. 1498.)

Local Modification.—Mecklenburg: 1933, c. 278.

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-317, 7-374, 7-437.

Duty of Justice.—It is the duty of a justice of the peace, upon affidavit and motion (now a written request) for a removal being filed, to remove the case to another justice residing in the same township, *State v. Ivie*, 118 N. C. 1227, 24 S. E. 539 (1896); and if there be no other justice in the same township he can remove the case to the justice of a neighboring township.

Same—Removal to Improper Justice.—

If the case is removed to a justice of a neighboring township when there is another justice in the same township in which the action is commenced, the justice to whom the case is thus removed has no jurisdiction, and his judgment is void. *State v. Warren*, 100 N. C. 489, 490, 5 S. E. 662 (1888); *State v. Ivie*, 118 N. C. 1227, 24 S. E. 539 (1896).

Not Applicable to Mayor's Court.—The provisions of this section apply only to courts of justices of the peace and in a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal. *State v. Joyner*, 127 N. C. 541, 37 S. E. 201 (1900).

§ 7-148. Removal in case of death or incapacity.—If any justice of the peace dies or becomes incapacitated by removal, resignation or other cause, having any action, civil or criminal, pending before him, which has not been finally determined, such action shall not abate or be discontinued, but the plaintiff in such civil action, or any one on behalf of the State in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the same is removed and by giving ten days' notice to the defendant of such re-

removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the plaintiff; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice. The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or costs which have theretofore been properly advanced by any party to such action. After such removal either party shall be entitled to all the rights given in § 7-147. (1905, c. 121; Rev., s. 1456; C. S., s. 1499.)

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-317, 7-374, 7-437.

§ 7-149. Rules of practice:

Rule 1, Pleadings. The pleadings in these courts are—

1. The complaint of the plaintiff.

2. The answer of the defendant. (Code, s. 840; Rev., s. 1457; C. S., s. 1500.)

Rule 2, Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action. (Code, s. 840, Rule 3; Rev., s. 1459; C. S., s. 1500.)

Generally.—When the parties come to trial in a justice's court, the justice should require the plaintiff to state in a plain and direct manner the facts constituting the cause of action. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234 (1906).

forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234 (1906).

Where two causes of action were set

Rule 3, Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim. (Code, s. 840, Rule 4; Rev., s. 1460; C. S., s. 1500.)

The pendency of another action for the same cause, may be set up in the answer, with other defenses, and any issue arising thereon may be submitted at the same time as the others growing out of the pleadings, with instructions to the jury that, if found for the defendant, the others need not be considered. *Monta-*

gue v. Brown, 104 N. C. 161, 10 S. E. 186 (1889).

Same—Waiver.—Unless this defense is set up in the answer or in some way insisted on, before the trial on the merits, it will be considered as waived. *Blackwell v. Dibblell Bros. & Co.*, 103 N. C. 270, 9 S. E. 192 (1889).

Rule 4, Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true. (Code, s. 840, Rule 11; Rev., s. 1461; C. S., s. 1500.)

Rule 5, Order on demurrer. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded. (Code, s. 840, Rule 12; Rev., s. 1462; C. S., s. 1500.)

Rule 6, Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket. (Code, s. 840, Rule 2; Rev., s. 1458; C. S., s. 1500.)

In General.—While we liberally construe pleadings filed in the court of a justice of the peace, they must substantially conform to the statutory requirements, i. e., there shall be a complaint and answer; if oral, the justice may enter the

substance on his docket, and, if written, the pleadings may be filed and reference made to them on the docket; the answer may state the facts constituting a defense or counterclaim. *Baxter v. Irvine*, 158 N. C. 277, 73 S. E. 882 (1912).

Written Pleadings.—Where the parties to an action before a justice of the peace have elected to file written pleadings, the pleadings are subject to the rule that material allegations in the complaint not denied by the answer stand admitted. *Parker v. Horton*, 176 N. C. 143, 96 S. E. 904 (1918).

Oral Pleadings.—In actions before justices of the peace the pleadings may be oral, but if so, the substance of them must

be entered on the docket, and contain, in a plain and distinct manner, the ground of the action; and if the facts relied on as a defense be new matter, notice of that, also, must be given on the docket, in a plain and direct manner. *Montague v. Brown*, 104 N. C. 161, 10 S. E. 186 (1889).

Applied in Home Bldg., etc., Ass'n v. Moore, 207 N. C. 515, 177 S. E. 633 (1935).

Rule 7, No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant. (Code, s. 840, Rule 5; Rev., s. 1463; C. S., s. 1500.)

Technical Accuracy Not Required.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the court to amend either in substance or form, at any time before or after judgment in furtherance of justice. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392 (1920).

Informality or Irregularity.—Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where this section expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355 (1921).

Rule 8, No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover. (Code, s. 840, Rule 6; Rev., s. 1464; C. S., s. 1500.)

Rule 9, Action on account or note. In an action or defense, founded on an account, or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off. (Code, s. 840, Rule 7; Rev., s. 1465; C. S., s. 1500.)

Note for Purchase of Land.—Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his

jurisdiction is not ousted by reason of the note having been executed for the purchase of land. *Parker v. Horton*, 176 N. C. 143, 96 S. E. 904 (1918).

Rule 10, Account or demand exhibited. The justice may at the joining of issue require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated. (Code, s. 840, Rule 10; Rev., s. 1469; C. S., s. 1500.)

Rule 11, Variance. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby. (Code, s. 840, Rule 8; Rev., s. 1466; C. S., s. 1500.)

Rule 12, No process quashed for want of form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms

as shall be deemed just, at any time either before or after judgment. (1794, c. 414, P. R.; R. C., c. 3; R. C., c. 62, s. 22; Code, s. 908; Rev., s. 1467; C. S., s. 1500.)

Docket Incomplete. — In bastardy proceedings the justice of the peace before whom the trial is had should take the denial of the defendant under oath, before trying the case, so as to make up the issue, and should regularly note it on his docket and in his return; and if the docket is incomplete in this respect the superior court judge on appeal should allow the denial to be entered *nunc pro tunc*. *State v. Currie*, 161 N. C. 275, 76 S. E. 694 (1912).

In *State v. Mills*, 181 N. C. 530, 106 S. E. 677 (1921), the court said: "A clear analysis of this section (which was § 1-577 of the Code) is made by Justice Ashe in *State v. Vaughan*, 91 N. C. 532 (1884), showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions."

Applicable to Final Judgments Only. — Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., this section, Rule 12, and § 7-179, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court. *Graves v. Reidsville Lodge*, 182 N. C. 330, 109 S. E. 29 (1921).

Amendment of Warrants. — The superior court, under Rule 12 of this section, may allow, within the discretion of the court, an amendment to a warrant both as to form and substance before or after verdict, pro-

vided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. *State v. Brown*, 225 N. C. 22, 33 S. E. (2d) 121 (1945).

A warrant may be defective in form and substance and yet contain sufficient information to inform defendant of the accusation made against him. Such a warrant may be amended. *State v. Brown*, 225 N. C. 22, 33 S. E. (2d) 121 (1945).

It is contemplated in the law, that magistrates, not learned in the law, may sometimes issue papers defective in form, and even in substance, but the method of correction is provided by this section. *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

On appeal to the superior court from a county court upon conviction for assault, the superior court has power to allow an amendment of the warrant by the addition of the words "inflicting serious injury" provided the charge as amended is within the jurisdiction of the county court since the amendment does not change the offense with which the defendant was charged. *State v. Carpenter*, 231 N. C. 229, 56 S. E. (2d) 713 (1949).

Amendments Liberally Allowed. — While amendments to process and pleading, under our procedure, in both civil and criminal causes, are liberally allowed by this and § 1-163, this does not imply that the court has power to change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended. *State v. Clegg*, 214 N. C. 675, 200 S. E. 371 (1939).

Stated in *Carson v. Doggett*, 231 N. C. 629, 58 S. E. (2d) 609 (1950).

Rule 13, Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party. (Code, s. 840, Rule 9; Rev., s. 1468; C. S., s. 1500.)

Power Not Reviewable. — The discretionary power to amend a complaint conferred upon a justice of the peace is not reviewable on appeal. *State v. Taylor*, 118 N. C. 1262, 24 S. E. 526 (1896).

Nature of Amendment Allowable. — The superior court has the power to amend a justice warrant in a criminal action, in form

or substance, but the amendment must not change the nature of the offense intended to be charged. *State v. Vaughan*, 91 N. C. 532 (1884); *State v. Taylor*, 118 N. C. 1262, 24 S. E. 526 (1896).

Amendment of Indictment. — An indictment before a justice of the peace may be amended by the trial judge upon the trial

in the superior court on appeal. *State v. Holt*, 195 N. C. 240, 141 S. E. 585 (1928).

The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. *State v. Poythress*, 174 N. C. 809, 93 S. E. 919 (1917).

Words Omitted.—Where a warrant was defective due to the omission of certain words, it was held to be within the discretion of the court to permit an amendment inserting the necessary words. *Laney v.*

Mackey, 144 N. C. 630, 57 S. E. 386 (1907).

Allegation of Value Omitted.—Where, in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212 (1893).

Equitable Proceedings.—On the trial of an appeal from a justice of the peace, of an action that sought to recover for a breach of contract, and also to enforce an equity, the trial judge properly allowed an amendment discarding the equitable proceeding. *Starke v. Cotton*, 115 N. C. 81, 20 S. E. 184 (1894).

Rule 14, Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer. (Code, s. 840, Rule 16; Rev., s. 1471; C. S., s. 1500.)

In General.—The tender, made under the provision of this section must be a proposition (made before any defence is set up) to pay a specified sum in discharge of the plaintiff's claim, and not a sum in excess of a counterclaim. *Rand v. Harris*, 83 N. C. 486 (1880).

Money Paid into Court.—Money tend-

ered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs, if withdrawn by plaintiffs, pending the litigation, amounts to a satisfaction of their claim, and subjects the plaintiffs to all subsequently accruing costs." *Cline v. Rudisill*, 126 N. C. 523, 36 S. E. 36 (1900).

Rule 15, Continuance. Any justice before whom an action is brought may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days. (Code, s. 840, Rule 17; Rev., s. 1472; C. S., s. 1500.)

Termination of Proceeding.—When a justice of the peace continues a criminal action for malicious prosecution upon a request of the prosecuting witness, and more than thirty days has passed without a trial,

in which the prosecutor has remained inactive, the criminal proceeding is terminated under Rule 15 of this section. *Winkler v. Lenoir, etc.*, *Rock Lines*, 195 N. C. 673, 143 S. E. 213 (1928).

Rule 16, Chapter on civil procedure applicable. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts. (Code, s. 840, Rule 15; Rev., s. 1473; C. S., s. 1500.)

Cross Reference.—See § 7-135 and notes.

Appointment of Next Friend.—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a justice's court, the appointment should be made by the justice

of the peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required, by the clerk, in actions properly brought in the superior court. *Houser v. Bonsal & Co.*, 149 N. C. 51, 62 S. E. 776 (1908).

Rule 17, Attachment proceedings. Attachment proceedings before justices of the peace are governed by the provisions of §§ 1-440.47 through 1-440.56. (Code, s. 853; Rev., s. 1474; C. S., s. 1500; 1947, c. 693, s. 2.)

Cross Reference. — As to attachments generally, see § 1-440.1 et seq.

Editor's Note. — The 1947 amendment rewrote Rule 17.

Purpose.—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the State, and is only incidental to the relief sought in the original action, and the warrant in

garnishment may run beyond the limits of the county wherein the action was brought. *Mohn v. Cressey*, 193 N. C. 568, 137 S. E. 718 (1927).

Remedy for Wrongful Issue. — An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. *Merrill v. McHone*, 126 N. C. 528, 36 S. E. 35 (1900).

Rule 18, Claim and delivery and arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words, "justice of the peace" for "judge," "clerk" or "clerk of the court," and inserting the words "or constable" after "sheriff," whenever they occur. (1876-7, c. 251; Code, ss. 849, 889; Rev., s. 1475; C. S., s. 1500.)

Cross References.—As to arrest and bail, see § 1-409 et seq. As to claim and delivery, see § 1-472 et seq.

Rule 19, Actions for damages and for conversion. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court. (1876-7, c. 251; Code, s. 888; Rev., s. 1476; C. S., s. 1500.)

Damages Limited to Fifty Dollars. — A justice of the peace under this section has jurisdiction of an action for damages, not exceeding fifty dollars, for injury to personal property, though such property be of greater value than fifty dollars. *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880

(1898).

An action for damages for converting a crop of greater value than fifty dollars is not founded on an implied contract, and hence is not within the cognizance of a justice's court. *Womble v. Leach*, 83 N. C. 84 (1880).

Rule 20, Action on former judgment. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made. (Code, s. 844; Rev., s. 1477; C. S., s. 1500.)

Rule 21, Rehearing of case. When a judgment has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer, to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be reheard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith. (Code, s. 845; Rev., s. 1478; C. S., s. 1500.)

In General.—A new trial cannot be allowed in a justice's court, but the party

dissatisfied with the judgment has his remedy only by appeal. But where the judg-

ment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. *Gambill v. Gambill*, 89 N. C. 201 (1883).

This and the other sections regulating procedure before justices of the peace, which makes the general provisions of the chapter applicable, do not confer on a non-resident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is appeal, so that the action may be heard de novo in the superior court, where he will be permitted to interpose his defense. *Thompson v. Lynchburg Notion Co.*, 160 N. C. 519, 76 S. E. 470 (1912).

Inexcusable Neglect. — Where the local agent of an incorporated company appeared on the return day of a summons, before a justice of the peace, and procured

a continuance for ten days, within which time it had an opportunity to employ counsel to represent it, but it neglected to do so until the day of the trial, when, because of delay in the mail, the counsel was not able to appear until after the trial, it was held to be inexcusable neglect. *Finlayson v. American Accident Co.*, 109 N. C. 196, 13 S. E. 739 (1891).

Justices of the peace have power to rehear cases decided by them, when mistake, surprise or excusable neglect is shown, and the application is made in ten days after the date of the judgment. After the lapse of that time, they can not rehear their judgments for such cause. *Navassa Guano Co. v. Bridgers*, 93 N. C. 439 (1885).

Statute of Limitations. — Where a judgment was rendered by a justice of the peace and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the latter, the first judgment having been vacated. *Salmon v. McLean*, 116 N. C. 209, 21 S. E. 178 (1895).

ARTICLE 20.

Jury Trial.

§ 7-150. **Parties entitled to a jury trial.**—When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same. (Const., art. 4, s. 27; C. S., s. 1501.)

Cross Reference.—As to jury trial in justice of peace court in criminal actions, see §§ 15-156 through 15-158.

§ 7-151. **Jury trial waived.**—A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury. (Code, s. 857; Rev., s. 1431; C. S., s. 1502.)

The "Due Process" Clause. — The requirements of the United States Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State courts affecting property must be by jury, but it is met if the trial be had according to the settled course of judicial proceedings. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897).

Rights Preserved on Appeal. — When a legislative act creates a court of original

jurisdiction for the trial of petty misdemeanors and prescribes an appeal to the superior court, the constitutional right of trial by jury is preserved. *State v. Shine*, 149 N. C. 480, 62 S. E. 1080 (1908).

Waiver.—If the defendant, after having been duly summoned, fails to appear and answer before a justice of the peace he thereby waives and loses the right to demand a trial by jury. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683 (1889).

§ 7-152. **Number constituting the jury.**—Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it. (Code, s. 866; Rev., s. 1440; C. S., s. 1503.)

§ 7-153. **Jury list furnished.**—The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list

of the jurors for the township for which such justice is elected or appointed. (Code, s. 854; Rev., s. 1428; C. S., s. 1504.)

§ 7-154. Names kept in jury box.—Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice. He shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law. (Code, ss. 855, 856; Rev., ss. 1429, 1430; C. S., s. 1505.)

Cross Reference.—See § 9-2 and notes.

§ 7-155. Fees deposited for jury trial.—Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend. (Code, s. 869; Rev., s. 1432; C. S., s. 1506.)

§ 7-156. Jury drawn and trial postponed.—When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice. (Code, s. 858; Rev., s. 1433; C. S., s. 1507.)

Constitutional Provisions.—The method upon the power of the General Assembly by which jurors are to be selected and summoned is not provided for in the Constitution, and there is no limitation therein to regulate it. *State v. Brittain*, 143 N. C. 668, 57 S. E. 352 (1907).

§ 7-157. Summoning the jury.—A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him. For performing the aforementioned duties, he shall receive the fee allowed by law for summoning jurors. The preceding sentence shall not apply to the counties of Beaufort, Brunswick, Cabarrus, Edgecombe, Forsyth, Gaston, Gates, Guilford, Halifax, Martin, McDowell, Orange, Pasquotank, Rowan, Transylvania, and Wake. (Code, s. 859; Rev., s. 1434; C. S., s. 1508; 1935, c. 309.)

§ 7-158. Selection of jury.—At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue. (Code, s. 860; Rev., s. 1435; C. S., s. 1509.)

§ 7-159. Challenges.—Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors. (Code, s. 861; Rev., s. 1436; C. S., s. 1510.)

§ 7-160. Names returned to the jury box.—The scrolls containing the names of jurors not summoned, if any, and of those summoned but not drawn, and of those drawn but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls con-

taining the names of such as are not legally liable or legally qualified to serve as jurors shall be destroyed. (Code, s. 862; Rev., s. 1437; C. S., s. 1511.)

§ 7-161. **Names of jurors serving.**—The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance. (Code, s. 868; Rev., s. 1441; C. S., s. 1512.)

§ 7-162. **Tales jurors summoned.**—If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury. (Code, s. 863; Rev., s. 1438; C. S., s. 1513.)

§ 7-163. **No juror to serve out of township.**—No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman. (Code, s. 867; Rev., s. 1439; C. S., s. 1514.)

§ 7-164. **Additional deposit for jury fees on adjournment.**—No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice in the beginning, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto. (Code, s. 870; Rev., s. 1442; C. S., s. 1515.)

§ 7-165. **Jury sworn and impaneled; verdict; judgment.**—The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict. (Code, s. 864; Rev., s. 1443; C. S., s. 1516.)

ARTICLE 21.

Judgment and Execution.

§ 7-166. **Justice's judgment docketed; lien and execution.**—A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court; but in case a stay of execution upon such judgment shall be granted, as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered, except that it

shall be a lien only from the time of filing and docketing such transcript. (Code, s. 839; Rev., s. 1479; C. S., s. 1517.)

Cross Reference.—As to removing judgment of justice of peace to another county for execution, see § 7-169.

Generally. — A judgment in a justice's court does not create a lien upon the property of the defendant. To have this effect a transcript of the judgment must be filed and docketed in the office of the superior court clerk of the county wherein the judgment is rendered. *Ledbetter v. Osborne*, 66 N. C. 379 (1872).

Judgment Conclusive. — Where a judgment was obtained before a justice of the peace and docketed in the office of the superior court clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. *Ledbetter v. Osborne*, 66 N. C. 379 (1872).

Amendments of the judgment before the magistrate, or of the transcript, can be made only before the tribunal which gave it; no court has original power to amend the records of another court. *McAden v. Banister*, 63 N. C. 479 (1869).

Presumed Regular.—Though the signature of the justice of the peace is not attached to the judgment, it is presumed from the term of the certificate of authentication that it was entered up regularly and in proper form. *Surratt v. Crawford*, 87 N. C. 372 (1882).

Priorities.—If a number of justice's judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the

sale of the land must be first applied to the payment of all the justice's judgments. *Perry v. Morris*, 65 N. C. 221 (1871).

Same—Fractional Parts of a Day.—The law takes notice of the fractional part of a day when there is a conflict between creditors arising as to the application of money received on justice's judgment filed and docketed on the same day. *Bates v. Hinsdale*, 65 N. C. 423 (1871).

Where Docketed.—A judgment given by a magistrate in one county cannot be docketed in another, unless previously docketed in the former county; and what is allowed to be docketed in the latter county is the transcript of judgment as docketed in the former. *McAden v. Banister*, 63 N. C. 479 (1869).

Docketing in Different Counties.—See § 7-169.

Same—Its Nature in Superior Court.—If the judgment has been docketed in the superior court and subsequently vacated by the justice of the peace, the defendant may, upon motion, have the judgment therein set aside; such docketing, however, only operates as a judgment of the superior court for the purposes of lien. *Whitehurst v. Merchants, etc., Co.*, 109 N. C. 342, 13 S. E. 937 (1891).

A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court, and may be enforced by execution at any time within ten years from the date of such docketing. *McIlhenny v. Wilmington Sav., etc., Co.*, 108 N. C. 311, 12 S. E. 100 (1891); *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936). See also § 1-234 and notes thereto.

The judgment as actually docketed is the only authority for the execution named; the form of the docketed judgment depends upon that of the transcript actually sent. *McAden v. Banister*, 63 N. C. 479 (1869).

§ 7-167. Effect of judgment on appeal.—In cases of appeal to the superior court from a justice's judgment docketed in such court, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of such justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment, except prior attachment liens and judgment on the same. The clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. When the judgment of the superior

court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall note such satisfaction on the record of the justice's judgment. (1903, c. 179; Rev., s. 1479; C. S., s. 1518.)

Effect of Appeal. — An appeal from a judgment of the justice of the peace does not deprive the plaintiff of the right to have the judgment docketed, nor does it

take away the lien of the judgment. *Dunham v. Anders*, 128 N. C. 207, 38 S. E. 832 (1901).

§ 7-168. Entries made by clerk when judgment is rendered.—Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word "reversed," "modified," or "affirmed," as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying, or affirming the former judgment. Any clerk failing to perform such duties as are required of him in this section shall pay to any person all such damages as he may have sustained by such failure. (Rev., s. 1479; 1907, c. 880; C. S., s. 1519.)

§ 7-169. Justice's judgment removed to another county.—Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of the county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed. (Code, s. 846; Rev., s. 1480; C. S., s. 1520.)

Cross Reference.—As to execution issuing on judgment rendered in a justice of the peace court when docketed in the office of the clerk of the superior court, see § 7-166.

Docketing in Different Counties. — The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant's land in the first county. *Perry v. Morris*, 65 N. C. 221 (1871).

§ 7-170. Issue and return of execution.—Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same. (Code, s. 840, Rule 14; Rev., s. 1481; C. S., s. 1521.)

Failure to Docket.—The lost vitality of a judgment not docketed within one year from its rendition cannot be restored by placing it on the docket of the superior court. *Woodard v. Paxton*, 101 N. C. 26, 7 S. E. 469 (1888); *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645 (1894). Nor will such docketing in the superior court arrest the running of the statute of limitation. *Daniel v. Laughlin*, 87 N. C. 433 (1882).

Same — Rights of Purchaser. — A purchaser under an execution on a judgment of a justice of the peace docketed after the lapse of one year acquires no title although he be a stranger to the judgment and with-

Docketing in the county where the judgment was rendered is necessary before the same can be docketed in another county. *McAden v. Banister*, 63 N. C. 479 (1869).

Same—The Transcript Docketed.—The transcript is what is allowed, by this section, to be docketed in the county other than that where the judgment was rendered. *McAden v. Banister*, 63 N. C. 479 (1869).

out notice. *Cowen v. Withrow*, 114 N. C. 558, 19 S. E. 645 (1894).

Execution may be issued by the justice of the peace unless the cause has been removed to the superior court, and he may likewise recall the execution where it is improvidently issued. *Bailey v. Hester*, 101 N. C. 538, 8 S. E. 164 (1888).

Application of Proceeds. — A justice of the peace has no jurisdiction to direct the application by a sheriff, of the proceeds of an execution issued by another justice of the peace upon the ground that the latter was null and void. *Cary v. Allegood*, 121 N. C. 54, 28 S. E. 61 (1897).

§ 7-171. **Levy and lien of execution.**—Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court. (1868-9, c. 159, s. 5; Code, s. 841; Rev., s. 1482; C. S., s. 1522.)

To Whom Directed.—Execution from a justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. But a constable cannot serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. *McGloughan v. Mitchell*, 126 N. C. 681, 36 S. E. 164 (1900).

Same — Appraisers. — A constable to whom an execution from the court of a justice of the peace has been delivered may summon appraisers and administer to them the prescribed oaths. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

Personal Property.—It is not necessary, under this section, that the judgment be docketed in the superior court, to entitle the judgment creditor to an execution against personal property. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

Real Property.—A judgment of a justice of the peace, when duly docketed in the office of the superior court clerk, becomes a judgment of that court to all intents and purposes, and is a lien upon all of the real estate of the defendant in the county. *Dysart v. Brandreth*, 118 N. C. 968, 23 S. E. 966 (1896).

§ 7-172. **Stay of execution.**—In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace. (1868-9, c. 272; Code, s. 842; Rev., s. 1483; C. S., s. 1523.)

§ 7-173. **Security on stay of execution.**—The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both. (Code, s. 843; Rev., s. 1484; C. S., s. 1524.)

Generally.—An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in

the superior court against the appellant. It is not necessary, to bind the appellant party to a suit, that he should sign the undertaking. *Walker v. Williams*, 88 N. C. 7 (1883).

Judgment Remains Unimpaired.—Although the execution on the judgment may be stayed on giving it undertaking as herein provided for, the force and effect of the judgment remains unchanged. *Dunham v. Anders*, 128 N. C. 207, 38 S. E. 832 (1901).

§ 7-174. **Stay of execution on appeal.**—In all cases of appeal from justices' courts, if the appellant desires a stay of execution of the judgment, he may,

at any time, apply to the clerk of the appellate court for leave to give the undertaking as provided in a subsequent section; and the clerk, upon the undertaking being given, shall make an order that all proceedings on the judgment be stayed. Instead of before the clerk of the appellate court, the appellant may give the undertaking before the justice who tried the cause, who shall indorse his approval thereon. (1869-70, c. 187; Code, ss. 882, 883; Rev., ss. 1485, 1486; C. S., s. 1525.)

Mortgage as Substitute for Undertaking.—There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of the undertaking on appeal from a justice's judgment, required by this section. Yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. *Comron v. Standland*, 103 N.

C. 207, 9 S. E. 317 (1889).

Judgment Remains Unimpaired.—See note of *Dunham v. Anders*, 128 N. C. 207, 38 S. E. 832 (1901), § 7-173.

Action on Bond.—In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff has sustained damage on account of the appeal. *McMinn v. Patton*, 92 N. C. 371 (1885).

§ 7-175. **Nature of undertaking.**—The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties. And in the event that said defendant shall prior to entry of the final judgment be adjudicated a bankrupt, then and in that event, the surety or sureties on said bond shall remain bound as if they were co-debtors with the defendant and the plaintiff may continue the prosecution of the action against said sureties, as if they were co-defendants in the cause. (1879, c. 68; Code, s. 884; Rev., s. 1487; C. S., s. 1526; 1933, c. 251, s. 1.)

Editor's Note.—The 1933 amendment added the second sentence.

Substantial Compliance Sufficient.—A literal compliance with the provisions of this section is unnecessary—a substantial compliance is sufficient. *McMinn v. Patton*, 92 N. C. 371 (1885).

Surety's Liability Attaches When Final Judgment Rendered against Principal.—The liability of a surety on a bond given in accordance with this section to stay execution of a judgment of the justice of the peace pending appeal, as provided by § 7-174, attaches when or if final judgment is rendered against the principal, and where the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule in bankruptcy, no final judgment is rendered against the principal, and the surety may not be held liable on the stay

bond. Note: this decision was given on the basis that chapter 251, Public Laws of 1933, amending this section, is prospective in effect and does not apply to bonds executed prior to its effect. *Sutton v. Davis*, 205 N. C. 464, 171 S. E. 738 (1933).

Mortgage as Substitute for Undertaking.—See note of *Comron v. Standland*, 103 N. C. 207, 9 S. E. 317 (1889), § 7-174.

Effect of Bankruptcy.—Where a judgment was rendered against the defendant before a justice of the peace, and an undertaking filed as provided for by this section, and pending the appeal he obtained a discharge in bankruptcy, it was held, that the sureties were not liable. *Iaffoon v. Kerner*, 138 N. C. 281, 50 S. E. 654 (1905). This case was decided prior to the 1933 amendment. For a discussion of the case and the change effected by the amendment, see 11 N. C. Law Rev. 221.

§ 7-176. **Execution stayed upon order given.**—A delivery of a certified copy of the order, hereinbefore mentioned, to the justice of the peace shall stay the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof. (Code, s. 885; Rev., s. 1488; C. S., s. 1527.)

ARTICLE 22.

Appeal.

§ 7-177. **No new trial; either party may appeal.**—A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed. (Code, s. 865; Rev., s. 1489; C. S., s. 1528.)

Cross References.—As to appeal from court of justice of peace being first heard in recorder's court, see § 7-243; in county civil court, see § 7-373; in special county court, see § 7-427. As to rehearing when judgment rendered against party absent because of sickness, excusable mistake or neglect, see Rule 21 of § 7-149.

New Trial Not Allowed.—When both parties to an action are present at the trial in a justice court, and the case is heard and judgment rendered, a new trial cannot be allowed. The party dissatisfied must appeal to the superior court. Froneburger v. Lee, 66 N. C. 333 (1872).

Strict compliance with the requirements for perfecting the appeal given by this section is required. Green v. Hobgood, 74 N. C. 234 (1876).

Time for Taking.—See note of Hahn v. Guilford, 87 N. C. 172 (1882), § 7-179.

Rehearing.—See note of Salmon v. McLean, 116 N. C. 209, 21 S. E. 178 (1895), § 7-149, Rule 21.

Bastardy Proceeding.—A bastardy proceeding, being a civil action, is subject to appeal by either party. State v. Liles, 134 N. C. 735, 47 S. E. 750 (1904).

Cited in State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).

§ 7-178. **Appeal does not stay execution.**—No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution. (1876-7, c. 251, s. 6; Code, s. 875; Rev., s. 1490; C. S., s. 1529.)

An appeal from a justice of the peace does not vacate the judgment nor does it

suspend its operation. Dunham v. Anders, 128 N. C. 207, 38 S. E. 832 (1901).

§ 7-179. **Manner of taking appeal.**—The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for. (1876-7, c. 251, s. 7; Code, s. 876; Rev., s. 1491; C. S., s. 1530.)

This section applies to causes of which the court has acquired jurisdiction, and does not affect a case which enables one to obtain relief from a judgment entered against him when the court for lack of service was without jurisdiction to make any orders in any way affecting the rights of person or property. Graves v. Reidsville Lodge, 182 N. C. 330, 109 S. E. 29 (1921).

The principle both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justice of the peace as well as to those of more extensive jurisdiction. Graves v. Reidsville Lodge, 182 N. C. 330, 109 S. E. 29 (1921).

Duty of Justice.—A justice of the peace who takes a case under advisement and later renders judgment must notify the parties thereof to afford them opportunity

to appeal in accordance with the provisions of the statute. Blacker v. Bullard, 196 N. C. 696, 146 S. E. 807 (1929).

Time.—An appeal must be taken to the next term of the appellate court. Hahn v. Guilford, 87 N. C. 172 (1882).

In accordance with practice and procedure in courts of justices of peace, an appeal to the superior court means to the next term of the court to which an appeal in orderly and regular course would go. Starr Elec. Co. v. Lipe Motor Lines, 229 N. C. 86, 47 S. E. (2d) 848 (1948).

From the decision of a justice of the peace in a bastardy proceeding either the woman or the defendant may appeal to the superior court, but the appeal must be taken to the next term. The superior court has no right to dispense with this requirement. Helsabeck v. Grubbs, 171 N. C. 377, 88 S. E. 473 (1916). The "next term" means any term, civil or criminal, which begins after the expiration of the ten days

allowed for serving the notice of appeal. *State v. Fleming*, 204 N. C. 40, 167 S. E. 483 (1933).

The carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant is not notice of appeal as herein contemplated and cannot be construed as a compliance with this section and § 7-180. *Higdon v. Nantahala Power, etc., Co.*, 207 N. C. 39, 175 S. E. 710 (1934).

Service of Notice.—Where judgment is given on process not personally served, but served by publication, and the defendant does not appear at the trial, the defendant is entitled to take fifteen days' notice of judgment in which to serve notice of his appeal. *Thompson v. Lynchburg Notion Co.*, 160 N. C. 519, 76 S. E. 470 (1912).

Same—Discretion.—Although, where an appeal from a justice of the peace is regularly docketed in due time in the superior court, and proper notice of the appeal has not been given, a judge may, in his discretion, permit notice of appeal to be given, yet he has no discretion to revive an appeal lost by delay and to permit the same to be docketed at a subsequent term to the one to which it should have been returned. *Davenport v. Grisson*, 113 N. C. 38, 18 S. E. 78 (1893).

Same—Time of Service.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days

both upon the justice who tried the case and upon the appellee, and upon failure to give such notice, unless the judge, in his discretion, permits the notice to be given at the trial, the appeal should be dismissed. *State v. Johnson*, 109 N. C. 852, 13 S. E. 843 (1891).

Same—Excusable Neglect.—Where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. *Gambill v. Gambill*, 89 N. C. 201 (1883). See also, *Dunn v. Patrich*, 156 N. C. 248, 72 S. E. 220 (1911).

Actual Service.—Where the defendant is actually served with summons he is bound to take notice of the rendition of judgment. *Spaugh v. Boner*, 85 N. C. 208 (1881).

Service by Officer.—The notice of an appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. *Clark v. Deloatch Mills Mfg. Co.*, 110 N. C. 111, 14 S. E. 518 (1892).

Appeals under Workmen's Compensation Act shall, in so far as is reasonable and consonant with the language of the act and legislative intent, conform to this section. *Summerell v. Chilean Nitrate Sales Corp.*, 218 N. C. 451, 11 S. E. (2d) 304 (1940).

§ 7-180. No written notice of appeal in open court.—Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party. (1869-70, c. 187; 1876-7, c. 251, s. 8; Code, s. 877; Rev., s. 1492; C. S., s. 1531.)

Party Present.—Where the party is present when the appeal is prayed for, no written notice is required. *State v. Crouse*, 86 N. C. 617 (1882).

If notice of appeal be given in open court, the adverse party being present in person or by attorney at the time appeal is prayed, no written notice is required. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848 (1948).

Applicability of Estoppel.—Where the defendant upon judgment being rendered

against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers, who thereupon delayed in so doing, and thereafter the defendant changed his mind and filed with the clerk of the superior court a bond sufficient to cover the plaintiff's claim and costs: Held, that it was not error in the court below to refuse to dismiss the appeal. *Suttle v. Green*, 78 N. C. 76 (1878).

§ 7-181. Justice's return on appeal.—The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for his service, be paid him. The fee so paid

shall be included in the costs, in case the judgment appealed from is reversed. (Code, s. 878; Rev., s. 1493; C. S., s. 1532.)

Payment of Fees Necessary.—Officers of the court are not compelled to perform their duties until fees prescribed by law are paid or tendered them, but they must be demanded by them before laches can be imputed to litigants. *West v. Reynolds*, 94 N. C. 333 (1886).

Statement of Evidence Not Sent Up.—The requirement of this section that the justice file with the clerk, "the papers, proceedings and judgment in the case," does not include a statement of the evidence, unless there was an exception by one of the parties. *London v. Headen*, 76 N. C. 72 (1877).

Liability of Justice.—The sending up an appeal to the superior court by the justice of the peace upon the payment of the cost is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353 (1921).

Power of Justice Ends upon Transmission of Appeal.—After a justice of the peace has transmitted an appeal from his judgment and all the papers to the superior court, he has no power to grant a motion to set aside his judgment for want of jurisdiction. *Forbes v. McGuire*, 116 N. C. 449, 21 S. E. 178 (1895).

Remedy Where Justice Fails in His Duty.—Upon failure of a justice of the peace to make a return to notice of appeal,

appellant, if in no default, should move at the next ensuing term of the superior court for a writ of recordari to compel the justice of the peace to make the return and to file the papers, etc., as required by this section. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848 (1948).

A motion in the superior court for a recordari or an attachment under this section is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appellant would thus make the justice his agent and for his neglect he would be responsible. *MacKenzie v. Davidson County Develop. Co.*, 151 N. C. 276, 65 S. E. 1003 (1909).

Failure to Sign Return.—The failure of a justice of the peace to sign the return of notice of appeal does not vitiate the proceedings in the superior court, where the appellant had given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the superior court at the trial in person and by attorney. *Hawks v. Hall*, 139 N. C. 176, 51 S. E. 857 (1905).

§ 7-182. **Defective return amended.**—If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment. (Code, s. 879; Rev., s. 1494; C. S., s. 1533.)

Stated in *Hawks v. Hall*, 139 N. C. 176, 51 S. E. 857 (1905).

§ 7-183. **Restitution ordered upon reversal of judgment.**—If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment. (Code, s. 886; Rev., s. 1495; C. S., s. 1534.)

Involuntary Payments.—This section only applies where there has been an involuntary payment of or on the judgment.

Cowell v. Gregory, 130 N. C. 80, 40 S. E. 849 (1902).

ARTICLE 23.

Forms.

§ 7-184. **Forms to be used in justice's court.**—The following forms,

or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this article:

[No. 1]

Summons

North Carolina, County, Township.

A.....B.....	} Before
against	
C.....D.....	} Justice of the Peace.

State of North Carolina, to any constable or other lawful officer of County—Greeting:

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of, on the day of, 19...., at his office (or elsewhere, as the justice may appoint the place of trial), in Township, to answer A. B. in a civil action for the recovery of dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 2]

Summons on Allowing Application to Rehear
(Title, etc., as in No. 1)

Whereas, A. B., plaintiff above named (or C. D., defendant above named), has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the day of, 19....; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of, on the day of, 19...., at, in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 3]-[No. 16]

Repealed by Session Laws 1947, c. 693, s. 3.

[No. 17]

Affidavit for Arrest on Debt Fraudulently Contracted
(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of dollars on an inland bill of exchange, drawn on the day of, 19.... by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the day of, 19...., the defendant applied to the plaintiff to purchase a bill of goods amounting to dollars, which

the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the day of, 19...., the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B.

Sworn to and subscribed before me, this day of, 19....

G. W. H.
Justice of the Peace.

[No. 18]

Undertaking on Arrest
(Title as in No. 1)

Whereas, the plaintiff above named is about to apply (or has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of County, and P. P., of County, undertake, in the sum of dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J.
P. P.

Signed in my presence, this day of, 19....

G. W. H.
Justice of the Peace.

[No. 19]

Order of Arrest
(Title as in No. 1)

North Carolina, County, Township.
To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the day of, 19....; of which return you will give notice to plaintiff or his attorney.

Dated this day, 19....

G. W. H.
Justice of the Peace.

[No. 20]

Undertaking of Bail on Arrest
(Title as in No. 1)

Whereas, the above named defendant, C. D., has been arrested in this action; Now, therefore, we, B. B., of County, and D. D., of

County, undertake, in the sum of dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B.

D. D.

Signed in my presence, this day of, 19....

G. W. H.

Justice of the Peace.

[No. 21]

Notice of Exception to Bail

(Title as in No. 1)

To O. P. M., constable (or sheriff) of the county of

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B., Plaintiff.

(or M. W. N., Attorney for Plaintiff.)

Dated this day of, 19....

[No. 22]

Notice of Justification of Bail

(Title as in No. 1)

To A. B., Plaintiff (or M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the day of, 19....

Dated this day of, 19....

C. D.

or, M. W. N., Attorney for C. D.), Defendant.

[No. 23]

Notice of Other Bail

(Title as in No. 1)

Take notice that R. S., of County (physician), and Y. Y., of County (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, etc.

[No. 24]

Justification of Bail

(Title as in No. 1)

On this day of, 19...., before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this State;

2. That he is worth the sum of dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

(Signatures of bail.)

Examination taken and sworn to before me, this day of, 19.....

G. W. H.....
Justice of the Peace.

[No. 25]

Allowance of Bail

(Title as in No. 1)

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient, and allow the same.

Dated this day of, 19.....

G. W. H.....
Justice of the Peace.

[No. 26]

Subpoena to Testify

State of North Carolina, County.

To S. T....., greeting: (the justice may insert any number of necessary names.)

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the day of, 19....., to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).* Herein fail not, under the penalty prescribed by law. Witness our said justice, this day of, 19.....

G. W. H.....
Justice of the Peace.

[No. 27]

N. B.—The justice may, instead of a formal subpoena, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff:; and the following as witnesses for the defendant:; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this day of, 19.....

G. W. H.....
Justice of the Peace.

[No. 28]

Subpoena Duces Tecum

If any witness has a paper or document which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk (*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

[No. 29]

Form of Oath of Witness

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30]

Proceedings against Defaulting Witness

When a witness, under subpoena, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1)

To R. P.:

Take notice, that on the day of, 19...., the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the day of, 19...., for judgment against you for the sum of dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this day of, 19....

A. B....., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A.	B.	} Justice's Court.
	against	
C.	D.	

Motion for penalty against
R. P., defaulting witness.

..... day of, 19...., A. B., above named, appears, and according to a notice filed and duly served on R. P., moved for the penalty of dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the day of, 19...., as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of dollars, penalty forfeited by reason of the premises, and the further sum of dollars, costs of this motion.

[No. 31]

Form of a Venire

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of County:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the day of

....., 19...., for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 32]

Form of Juror's Oath

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33]

Form of Oath to Constable in Charge of the Jury

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34]

Summons against Defaulting Juror to Show Cause

State of North Carolina, to any constable or other lawful officer of
County—Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the day of, 19...., to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the day of, 19...., in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this day of, 19....

G. W. H.....
Justice of the Peace.

[No. 35]

Demurrer to Complaint
(Title as in No. 1)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it).

(Signature of defendant or defendant's attorney.)

[No. 36]

Demurrer to Answer
(Title as in No. 1)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or, for that the said answer is not sufficiently explicit to make this plaintiff understand it).

(Signature of plaintiff or plaintiff's attorney.)

[No. 37]

Judgment upon Demurrer

NOTE.—If the justice thinks the objection raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

“Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be).”

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

“The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of dollars, costs of this action (or that the plaintiff recover of the defendant the sum of dollars, damages, and the further sum of dollars, costs of this action).”

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows: “Demurrer to the complaint (or to the answer) filed, heard and overruled,” and he will then proceed to the evidence in the cause.

[No. 38]

Entry in Docket

NOTE.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

(Title as in No. 1)

....., 19..... Summons issued; returnable on the instant at my office.

....., 19..... Summons returned, served on defendant by O. P. M., constable, on the instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated, 19....., payable one day after date, for \$....., and also for goods sold and delivered to the defendant, and claims damages for \$.....

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of \$..... for wood sold and delivered to the plaintiff, and also of \$..... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

....., 19..... The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground), and rejected.

Having heard the evidence (and the arguments of a council, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly

sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for \$..... damages; whereupon, I adjudged that the plaintiff do recover of the defendant—

Damages, - - - - - \$.....

Costs, - - - - -

....., 19.... Execution issued for above judgment to O. P. M., constable.

....., 19.... Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

[No. 39]

Form of Notice of Appeal to the Superior Court, Where a New Trial of the Whole Matter Is to Be Had

(Title as in No. 1)

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the day of, 19...., in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this day of, 19....

W. W.....
Attorney for Appellant.

[No. 40]

Return to Notice of Appeal

A. B. }
 against }
C. D. } County of

To the Superior Court of County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of \$75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, dollars thereon; and he also claimed to have a set-off against the plaintiff to the amount of \$85 for board and lodging furnished to plaintiff and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for \$.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for \$65 damages, and for the further sum of \$3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-

nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of \$1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause. Dated this day of, 19....

G. W. H.....

Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41]

Where the Sum Demanded Exceeds Two Hundred Dollars

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of dollars, costs.

(Date and sign.)

[No. 42]

Where the Title to Real Estate Is in Question

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

Answer of Title

(Title as in No. 1)

The defendant answers to the complaint:

1. That no allegation thereof is true.

2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this day of, 19....

C. D....., Defendant.

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for dollars, costs.

[No. 43]

Tender of Judgment

(Title as in No. 1)

To C. D.....:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this day of, 19....

C. D....., Defendant.

[No. 44]

Acceptance of Tender of Judgment

(Title as in No. 1)

To A. B.....:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to

take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this day of 19.....

A. B....., Plaintiff.

[No. 45]

Form of Judgment on Tender

(Title as in No. 1)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proof and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46]

General Form—Execution

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of

County—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of dollars damages, and the further sum of dollars costs, on the day of, 19..;

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this day of 19.....

G. W. H.....

Justice of the Peace.

[No. 47]

Repealed by Session Laws 1947, c. 693, s. 3.

[No. 48]

Record of Conviction of a Contempt

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on the day of, 19...., while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in County, M. B. did willfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used); and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defense thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H.....
Justice of the Peace.

[No. 49]

Warrant of Commitment for a Contempt
(Title as in No. 1)

State of North Carolina, to the keeper of the common jail of
County—Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law.

Herein fail not.

Dated this day of, 19....

G. W. H.....
Justice of the Peace.

(Code, s. 909; Rev., s. 1496; C. S., s. 1535.)

SUBCHAPTER VI. RECORDERS' COURTS.

ARTICLE 24.

Municipal Recorders' Courts.

§ 7-185. In what cities and towns established; court of record.—

In each city and town in the State, which has acquired a population of one thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter. (1919, c. 277, ss. 1, 2; C. S., s. 1536; 1925, c. 32, s. 1.)

Local Modification.—Richmond: 1941, c. 60, s. 1.

Cross References.—As to abolishing municipal recorder's court, see § 7-212. See also, note to § 7-278.

Constitutionality.—Where the question of the constitutionality of this section establishing recorders' courts by a general act is the subject of the action, and pending the appeal the legislature has withdrawn the effect or operation of the statute from a certain county (Caldwell) wherein

the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. *Coffey v. Rader*, 182 N. C. 689, 110 S. E. 106 (1921).

Cited in *Stephens v. Dowell*, 208 N. C. 555, 181 S. E. 629 (1935); *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 7-186. Recorder's election and qualification; term of office and salary.—The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the municipality, either at the time of the establishment of the court or within thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occur in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office, as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality: Provided, that the governing body of such city or town is hereby authorized to provide a schedule of fees to be charged by said recorder. (1919, c. 277, s. 2; C. S., s. 1537; 1925, c. 32, s. 2; 1943, c. 543.)

Local Modification.—City of Belmont: 1949, c. 871, s. 1; city of Burlington: city of New Bern: 1949, c. 649; city of Randleman: 1947, c. 930, s. 1; town of Asheboro: 1947, c. 930, s. 1; town of Dallas: 1951, c. 963, s. 1.

Cross References.—As to forms of oath required of justice of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7, Const., Art. VI, § 7. As to penalty for failure to take oaths, see § 128-5.

Editor's Note.—The 1925 amendment added two provisos to this section. The 1943 amendment struck out the second proviso making the recorder eligible to hold the office of mayor.

Mandamus to Compel Appointment.—

When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of the statute that they elect a recorder in the manner specified therein, a mandamus will issue, in view of the public interests involved. *Battle v. Rocky Mount*, 156 N. C. 329, 72 S. E. 354 (1911).

Constitutional Provisions.—It is held in *State v. Bateman*, 162 N. C. 588, 77 S. E. 768 (1913), that a former requirement that the recorder must be "a licensed attorney at law" is unconstitutional, on the ground that it does not lie within the power of the legislature to add to the constitutional qualifications to hold office.

§ 7-187. Time and place of holding court.—The court shall be opened for the trial of criminal cases at least one day of each week, to be fixed by the governing body of the municipality, and shall continue its session from day to day until all business is legally disposed of. The court shall be held in the city or town hall, or other place provided therefor, and other sessions of the court may be called by the recorder, as necessity may require. (1919, c. 277, s. 3; C. S., s. 1538.)

§ 7-188. No subsequent change of judgment.—When a case has been finally disposed of and judgment pronounced therein, it shall not thereafter be reopened or the judgment or sentence rendered therein be modified, changed or stricken out by the recorder after the adjournment of the regular weekly term or after the adjournment of any special term called by the recorder. (1919, c. 277, s. 3; C. S., s. 1539.)

§ 7-189. Procedure in the court.—The recorder shall preside over the court and try and determine all criminal actions coming before him, the jurisdiction of which is conferred by this article, and the proceedings of the court

shall be the same as are now prescribed for courts of justices of the peace and for the superior court so far as the same may reasonably apply. (1919, c. 277, s. 9; C. S., s. 1540.)

§ 7-190. Criminal jurisdiction.—The court shall have the following jurisdiction within the following named territory:

1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the Constitution and general laws of the State, including all offenses of which the mayor or other municipal court now has jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of five miles thereof, which is now or may hereafter be given to justices of the peace under the Constitution and general laws of the State.

3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of five miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.

4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction.

5. All jurisdiction given by the general laws of the State to justices of the peace, or to the superior court, to punish for contempt, to issue writs ad testificandum, and other process to require the attendance of witnesses and to enforce the orders and judgments of the court. (1919, c. 277, s. 4; C. S., s. 1541; 1925, c. 32, s. 3.)

Local Modification. — City of Belmont: 1949, c. 871, s. 2, amended by 1951, c. 964, s. 1; City of Burlington: 1951, c. 452; Town of Mocksville: 1947, c. 1053.

Cross References.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64; for statutory definition of felony, see § 14-1.

Editor's Note. — The 1925 amendment changed the radius in subsections 2 and 3 from two to five miles.

Conflicting Jurisdiction of Magistrate and City Courts. — The legislature may constitutionally grant a city court exclusive jurisdiction of offenses occurring within

the city limits and embraced within the jurisdiction of a justice of the peace. *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742 (1906); but such exclusive jurisdiction cannot extend beyond the city limits. *State v. Doster*, 157 N. C. 634, 73 S. E. 111 (1911).

Jurisdiction Given Over Crimes below Grade of Felony.—In order that recorders' courts might be permitted to take cognizance of crime and try criminals without indictment, all crimes below the degree of felony have been declared to be "petty misdemeanors" by subsection 3 of this section. *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 7-191. Jurisdiction to recover penalties.—The recorder's court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within five miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality. (1919, c. 277, s. 10; C. S., s. 1542; 1925, c. 32, s. 4.)

Local Modification. — City of Belmont: 1949, c. 871, s. 3; City of Burlington: 1951, c. 452; Town of Dallas: 1951, c. 963, s. 2.

Editor's Note. — The 1925 amendment extended the radius from two to five miles of the corporate limits.

§ 7-192. Disposition of cases when jurisdiction not final.—In all cases heard by the recorder against any person for any offense whereof the court has not final jurisdiction and in which probable cause of guilt is found, such

person shall be bound in a bond or recognizance with sufficient surety to appear at the next succeeding term of the superior court of the county for the trial of criminal cases, and in default of such bond or recognizance he shall be committed to the common jail of the county to await trial; but in all capital cases such person shall be committed to the common jail of the county without bail. (1919, c. 5; C. S., s. 1543.)

§ 7-193. Disposition of cases when jurisdiction final.—All persons pleading guilty or convicted in the court of any offense of which the court has final jurisdiction shall be fined or imprisoned, according to law, and any person entering a plea of guilty, or who may be convicted of any such offense, shall also pay the costs of the prosecution. (1919, c. 277, s. 7; C. S., s. 1544.)

§ 7-194. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, to be assigned to work under the State Highway and Public Works Commission; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or State reformatory, or other penal institution provided by law for such purposes. (1919, c. 277, s. 8; C. S., s. 1545; 1945, c. 635.)

Cross References. — As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32. See also § 7-244.

Editor's Note. — The 1945 amendment struck out the words "and assign him to work on the public roads of the county as

provided by law" ending at the semi-colon and inserted in lieu thereof the words "to be assigned to work under the State Highway and Public Works Commission." It also struck out the former provision relating to sentence to work upon the roads of another county.

§ 7-195. Appeal to superior court.—Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9; C. S., s. 1546.)

Local Modification.—Pitt: 1937, c. 134; City of Belmont: 1949, c. 871, s. 4; Town of Dallas: 1951, c. 963, s. 3.

§ 7-196. Costs paid to the municipality.—All costs incurred in issuing warrants and serving the same in cases where the recorder has not final jurisdiction, and for the service of process arising in such cases when the process is served by the officer of the municipality, except as hereinafter provided, shall be paid to the municipality; and officers serving process issued from said court shall be allowed the same fees as are now allowed sheriffs in like cases, the same, when collected, to be paid over as herein provided. Where such officer is not an officer of a municipality such costs shall be dealt with as is now provided by law. (1919, c. 277, s. 6; C. S., s. 1547.)

§ 7-197. Seal of court.—The recorder's court shall have a seal with the impression, "The Recorder's Court of the City of,," which seal shall be used in the attestation of writs, warrants, or other process, acts, judgments, or decrees of the court, in the same manner and to the same effect as the seal of other courts in the State; but no process issuing from the court, to be

executed within the county in which court is held, shall require attestation by seal. (1919, c. 277, s. 11; C. S., s. 1548.)

Local Modification. — City of Belmont:

1949, c. 871, s. 5; Town of Dallas: 1951, c. 963, s. 4.

§ 7-198. Issuance and service of process.—The recorder may issue process to the chief of police of the municipality in which the court is held, or to the sheriff, constable, or other lawful officer of the county in which the municipality is located, or to any other county in the State; and such process, when attested by the seal of the court, shall run anywhere in the State, and shall be executed by all public officers authorized to execute process, and be returned by them according to law.

The summons, warrant of arrest, and every other writ, process, or precept issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy. (1919, c. 157; 1919, c. 277, s. 12; C. S., s. 1549.)

Local Modification. — City of Belmont: 1949, c. 871, s. 6; Town of Dallas: 1951, c. 963, s. 5.

Proper Proceeding.—Under the proceedings established in "recorders' courts," the complaint and warrant—which, if necessary, must be construed together—have

been established as the proper proceeding, just as has come down from the common law as to crimes the punishment of which is within the jurisdiction of a justice of the peace. *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 7-199. Vice recorder; election and duties.—The governing body of the municipality shall, at the same time and in the same manner as is provided in this article for the election of the first recorder, elect a vice recorder, who shall have the jurisdiction and authority conferred upon the recorder when the recorder shall be prevented from attending to his duties on account of sickness or other temporary disability or by reason of his temporary absence. The vice recorder shall receive the compensation allowed to the recorder for such services for the time that he may render such service, the compensation of the vice recorder to be deducted from the salary of the recorder, and the vice recorder shall be thereafter elected by the governing body of the municipality for the same term as the recorder is elected, and any vacancy occurring in the office of vice recorder shall be filled in the same manner as is provided for the filling of vacancies in the office of recorder. (1919, c. 277, s. 13; C. S., s. 1550.)

Local Modification. — City of Belmont:

1949, c. 871, s. 7; Town of Dallas: 1951, c. 963, s. 6.

§ 7-200. Clerk of court; election and duties; removal; fees.—The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the State, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall ex officio discharge the duties of the clerk of the court, unless the

governing body shall elect some other person to discharge the duties. The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore provided. Provided, that the governing body of the municipality is hereby authorized to provide a schedule of fees to be charged by the clerk of said court. (1919, c. 277, ss. 15, 18; C. S., s. 1551; 1925, c. 32, s. 5.)

Local Modification. — City of Belmont: added the proviso at the end of this section. 1949, c. 871, s. 8, amended by 1951, c. 964, s. 2; Town of Dallas: 1951, c. 963, s. 7.

Editor's Note. — The 1925 amendment Cited in *Stephens v. Dowell*, 208 N. C. 555, 181 S. E. 629 (1935).

§ 7-201. Clerk to keep records.—It shall be the duty of the clerk of the court to keep an accurate and true record of all costs, fines, penalties, forfeitures, and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing of the trial, and the punishment imposed, which record shall at all times be open to inspection by any of the city authorities, or other person having business relating to the court. The clerk shall keep a permanent docket for recording all the processes issued by the court, which shall conform to the dockets kept by the clerk of the superior court. He shall also keep in proper files, to be provided by the city, a record of all cases which shall be disposed of in the court and the disposition made thereof. (1919, c. 277, s. 17; C. S., s. 1552.)

Local Modification. — City of Belmont: 1949, c. 871, s. 9; Town of Dallas: 1951, c. 963, s. 8.

§ 7-202. Clerk to issue process.—The clerk of the court shall have all the power and authority now conferred upon justices of the peace to issue warrants for the arrest of all persons charged with the commission of offenses within the territory fixed in this article which warrants, however, shall be made returnable before the recorder of said court at the next sitting thereof, and shall be issued only upon affidavit made as now required by law to support warrants issued by justices of the peace. The clerk shall also have all power and authority of justices of the peace or clerk of the superior court to issue subpoenas or other process, to run anywhere within the State; and when such subpoenas or other process shall run beyond the county in which the court is located the same shall be attested by the seal of the court, and shall also be signed by the recorder. (1919, c. 277, s. 18; C. S., s. 1553.)

§ 7-203. Prosecuting attorney; duties and salary.—There shall be a prosecuting attorney in the court, who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality: Provided, that the governing body of any such municipality is hereby authorized to provide a schedule of fees to be charged by said prosecuting attorney. (1919, c. 277, s. 16; C. S., s. 1554; 1925, c. 32, s. 6.)

Local Modification. — Lenoir: 1949, c. 1237; City of Belmont: 1949, c. 871, s. 11; City of Fayetteville: 1951, c. 213; Town of Dallas: 1951, c. 963, s. 9.

Editor's Note. — The 1925 amendment added the proviso at the end of this section.

§ 7-204. Jury trial, as in justice's court.—In all trials in the court, upon demand for a jury by the defendant or the prosecuting attorney representing the

State, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply: Provided, however, that the compensation allowed jurors in all cases wherein the superior court has heretofore had final jurisdiction shall be the same as is allowed jurors in the superior court of the county in which the recorder's court is established. (1919, c. 277, s. 24; C. S., s. 1555.)

Local Modification.—Burke: 1931, c. 335; 1951, c. 589; Town of Asheboro: 1947, c. Craven: 1929, c. 115, s. 1; Currituck: 1951, 930, s. 2; City of Belmont: 1949, c. 871, s. c. 972, ss. 2, 3; Halifax: 1945, c. 628, s. 2; 12; Town of Cherryville: 1951, c. 660; Hoke: Pub. Loc. 1937, c. 408; Martin: 1951, Town of Dallas: 1951, c. 963, s. 10; City c. 183; Pitt: 1937, c. 134; Washington: of Randleman: 1947, c. 930, s. 2.

§ 7-205. Continuances, recognizances, and transcripts. — The recorder's court shall have the same authority to grant continuances, take bonds and recognizances, and render judgments on forfeited bonds and recognizances, as is now vested by law in the superior courts, and the procedure regulating the issuing and service of notices against defendants and their sureties upon bonds and recognizances, and all other proceedings in taking and enforcing judgments in such cases, shall be the same as in the superior court in like cases. Transcripts of any judgments rendered may be docketed in the superior court of the county in which such court is held, in the same manner and with the same effect as judgments of other courts docketed as provided by law. (1919, c. 277, s. 21; C. S., s. 1556.)

§ 7-206. Officers' fees; fines and penalties paid.—In each case disposed of by the recorder where the defendant is convicted or pleads guilty, there shall, in addition to other lawful costs, be allowed the following fees, to be taxed as a part of the costs against the defendant, viz.: For recorder, one dollar in each case involving the breach of a municipal ordinance and any crime or offense of which a justice of the peace has final jurisdiction, and a fee of two dollars in all other cases; for the prosecuting attorney, one dollar in all cases of violation of municipal ordinances and of any crime or offense of which a justice of the peace has final jurisdiction, and in all other cases a fee as now provided by law for solicitors prosecuting in the superior court; and for the clerk of such court the same fees as are now allowed to clerks of the superior court in similar cases; but in all cases of the breach of municipal ordinances and cases of which a justice of the peace has final jurisdiction and in which the defendant pleads guilty, the fee herein allowed a prosecuting attorney may be remitted by the recorder in his discretion. All costs recovered and collected in the court, except as herein otherwise provided, shall belong to the municipality and be paid into the treasury thereof. All fines and penalties collected shall be paid by the clerk of the court to the county treasurer as provided by law, and all fees allowed by law for an arrest or serving other process in a criminal action, when the same shall have been made by the chief of police or other officer who shall be on a salary, shall be paid over to the treasurer of the municipality for the use of the same, and to reimburse it for the expense of maintaining and supporting the court. (1919, c. 277, s. 14; C. S., s. 1557.)

Local Modification.—Cabarrus: 1937, c. 279; Harnett: 1933, c. 75, s. 1(g); City of Belmont: 1949, c. 871, s. 13; Town of Dallas: 1951, c. 963, s. 11.

Cross Reference.—For sections authorizing the governing bodies of municipalities to fix certain fees, see §§ 7-186, 7-200, 7-203.

§ 7-207. County to pay for offenders' work on roads.—Whenever, under any judgment of the court, any defendant is sentenced to work upon the public works of the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon such public works, then the county shall be liable for and shall pay to the treasurer of the municipality one-half the amount of the costs

taxed in the cause: Provided, the sentence imposed shall be of sufficient length to reimburse the county for one half of such costs. (1919, c. 277, s. 19; C. S., s. 1558; 1945, c. 635.)

Local Modification. — City of Belmont: substituted the words "public works of" for the words "public roads or other public work in" and made other alterations in phraseology in conformity to such change.

Editor's Note. — The 1945 amendment

§ 7-208. Prosecutor may be taxed with costs.—The recorder shall have full power, in any case in which he shall adjudge that the prosecution was not required by the public interests, to tax the prosecutor with the costs of such action; and in the event the recorder shall adjudge that prosecution is frivolous or malicious, he may imprison the prosecutor for the nonpayment of such costs, as provided by law for similar cases in other courts. When the costs are paid, they shall belong to the city. (1919, c. 277, s. 20; C. S., s. 1559.)

§ 7-209. Justice of the peace to bind defendants to recorder's court; procedure thereon.—In case any justice of the peace residing within the territory above mentioned shall bind any person over for any offense committed within said territory, of which the justice has committing, but not final, jurisdiction, but of which the recorder's court has final jurisdiction, then such justice of the peace, instead of binding the defendant over to the superior court of the county, shall bind him to appear at the recorder's court on the day succeeding the trial before the justice, at ten o'clock a. m. The justice of the peace shall at once turn over the case to the clerk of said court, and the clerk shall, upon receipt of the same, enter the case upon the docket of the court, and the recorder shall try such person either upon the original warrant under which he was bound over or upon a new warrant to be issued by him for such offense. In all cases the recorder shall have the right to amend any warrant issued by him or by the clerk of the court, or sent up by any justice of the peace as hereinbefore provided, in the same manner and to the same extent as justices of the peace are now authorized by law to make amendments to warrants in justices' courts. (1919, c. 277, s. 22; C. S., s. 1560.)

§ 7-210. Transfer of certain cases to recorder's court.—All cases which shall be pending in any recorder's, police, mayor's, or other municipal court in the counties where the courts provided for in this article shall be established shall, after the election and qualification of the recorder and other officers authorized and required by this article, be transferred to the recorders' courts of the respective municipalities, to be tried in the manner and in accordance with the procedure provided; but no case pending in the superior court of any county at the time this article takes effect shall be transferred to the recorder's court, except by order of the presiding judge thereof. No cause shall be removed from the recorder's court as is now provided for the removal of cases from one justice of the peace to another. (1919, c. 277, s. 23; C. S., s. 1561.)

§ 7-211. Jurisdiction of justice of the peace after three months delay.—If any criminal offense committed within the jurisdiction of any recorder's court, of which said court is given original, exclusive and final jurisdiction, is not prosecuted to a final termination within three months after the commission of the offense, any justice of the peace within the territory shall acquire jurisdiction to issue his warrant, apprehend the offender, and dispose of such warrant as is now provided by law. (1919, c. 277, s. 23; C. S., s. 1562.)

Local Modification. — City of Belmont: 1949, c. 871, s. 15; Town of Dallas: 1951, c. 963, s. 13.

§ 7-212. How municipal recorders' courts may be abolished.—The governing body of any municipality shall have the same power, to be exercised

in the same manner, subject to the same limitations, to abolish municipal recorders' courts as is given the board of commissioners of any county to discontinue a county recorder's court, under the provisions of § 7-239. (1919, c. 277, s. 35; C. S., s. 1582.)

§ 7-213. Extension of jurisdiction.—In any city or town within the State of North Carolina, having a population of five thousand inhabitants or more, where there is now maintained a recorder's court under and by virtue of the law, or in which a recorder's court may be hereafter established and maintained, it shall be lawful for the governing body of any such city or town, and the board of county commissioners of the county in which such city or town shall be located, to extend the jurisdiction of the recorder's court in such city or town to the township in which such city or town is located, in the manner described in the following sections. (1921, c. 216, s. 1; C. S., s. 1562(a).)

§ 7-214. Meeting of town and county authorities; election.—Whenever the governing body of any city or town, as described in § 7-213, and the board of county commissioners of the county in which the same shall be located, shall desire to extend the jurisdiction of the recorder's court in such city or town to include the whole township, as set forth in § 7-213, the mayor of such city or town and the chairman of such board of county commissioners shall call a joint meeting of the two boards, to be held at any place within such township as they may agree upon, and if a majority of each of such boards, at such meeting, shall by a joint resolution vote in favor of the extension of the jurisdiction of the recorder's court as herein described, then at such joint meeting the governing body of the town or city, and the board of county commissioners of the county, shall pass a joint resolution calling an election, submitting to the voters of the entire township the question of the extension of said municipal court, and that election shall be conducted by the county commissioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, in so far as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the town or city; the form of the ballot shall be as prescribed in § 163-155, subsec. (e), and if by such election such resolution is adopted it shall have the effect of conferring upon the recorder's court in such city or town the same powers, authority, and jurisdiction as to offenses or crimes committed within the township in which such city or town is located as such court would have had if the same had been committed in such city or town: Provided, however, that the extension of the jurisdiction of such recorder's court as herein described shall not have the effect of in any way extending or affecting in any manner whatsoever any ordinance or other law pertaining exclusively to such city or town. (1921, c. 216, s. 2; C. S., s. 1562(b).)

§ 7-215. Police powers.—Whenever the jurisdiction of any recorder's court shall have been extended as described in §§ 7-213 to 7-216, such action shall thereupon confer upon the police officers of such city or town the same powers and authority in making arrests for crimes and offenses committed anywhere within the township in which such city or town shall be located, as is now or may hereafter be conferred upon sheriffs or their deputies within their respective counties. (1921, c. 216, s. 3; C. S., s. 1562(c).)

§ 7-216. Resolution for extension filed with each board as records.—Whenever the governing board of any city or town and the county commissioners of the county shall have adopted the resolution extending the jurisdiction of the recorder's court as described in §§ 7-213 to 7-216, a copy of such resolution duly signed by the mayor and clerk of such city or town, and the chairman and clerk of such board of county commissioners, shall be duly filed with each board,

and shall be kept and maintained as a part of their official records. (1921, c. 216, s. 4; C. S., s. 1562(d).)

§ 7-217. Jurisdiction not to extend to other municipalities. — No court hereafter established by the governing body of any city or town shall have jurisdiction over the territory within the corporate limits of any other incorporated city or town, or outside the county in which the city or town establishing such court is located. (1925, c. 280.)

Local Modification. — Craven, Edgecombe, Nash, Robeson: 1925, c. 280.

ARTICLE 25.

County Recorders' Courts.

§ 7-218. Established by county commissioners. — In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county seat, the board of commissioners may, in their discretion, establish a recorder's court for the entire county, which shall be a court of record and shall be held at the county seat, or other place within the county provided by the board of commissioners. (1919, c. 277, s. 25; C. S., s. 1563; 1921, c. 110, s. 1; 1943, c. 543.)

Local Modification.—Caldwell: Pub. Loc. 1931, c. 138; Halifax: 1945, c. 627; Henderson: 1927, c. 103; 1937, c. 97; 1939, c. 238; Orange: 1947, c. 214, s. 1; Richmond: 1941, c. 60; Swain: Pub. Loc. 1939, c. 499.

Editor's Note. — The 1943 amendment

added at the end of this section the following words "or other place within the county provided by the board of commissioners."

Stated in State v. Norris, 206 N. C. 191, 173 S. E. 14 (1934).

§ 7-219. Recorder's election, qualification, and term of office.—The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be fixed in advance by the board of commissioners, and paid out of the county funds upon vouchers, and shall not be increased or decreased during his term. (1919, c. 277, s. 25; C. S., s. 1564.)

Local Modification. — Henderson: 1939, c. 238; Mecklenburg: 1937, c. 253; Orange: 1947, c. 214, s. 2; Perquimans: 1943, c. 742; 1951, c. 42; Scotland: 1925, c. 171; Washington: 1949, c. 1102.

Cross References.—As to forms of oaths required of justice of the peace, see §§ 11-6, 11-7, 11-11; Const., Art. VI, § 7. As to penalty for failure to take oaths, see § 128-5.

§ 7-220. Time and place for holding court.—The court shall be open for the trial of all criminal causes of which it has jurisdiction at least one day of each week, to be fixed by the board of county commissioners, and shall con-

continue its session from day to day until all business is transacted by trial, continuance, or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of commissioners for that purpose. Special sessions of the court may be called by the recorder as the necessities may require. (1919, c. 277, s. 26; C. S., s. 1565.)

§ 7-221. No subsequent change of judgment.—When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the regular weekly term of court or after the adjournment of any special term of court by the recorder. (1919, c. 277, s. 26; C. S., s. 1566.)

§ 7-222. Criminal jurisdiction.—The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendments to the constitution in reference thereto, then the county recorder's court, as established in this article, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere with or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1919, c. 277, s. 27; C. S., s. 1567.)

Local Modification. — Franklin: 1943, c. 350; Orange: 1947, c. 214, s. 4.

Cross Reference.—See § 7-64 and note.

§ 7-223. Jurisdiction and powers as in municipal court.—The recorders of county courts provided for in this article shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specifically in this section set forth, in so far as such jurisdiction and authority are applicable to such courts, and the provisions of this subchapter relative to municipal recorders' courts shall in all things apply to the county recorders' courts where same are not inconsistent and in so far as same are practically applicable: Provided, this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court. (1919, c. 277, s. 34; C. S., s. 1568.)

Local Modification.—Bertie: 1943, c. 772; Nash: c. 768.

§ 7-224. Removal of cases from justices' courts. — When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the recorder's court of the county. (1919, c. 277, s. 28; C. S., s. 1569; 1921, c. 110, s. 3.)

Local Modification.—Cleveland, Lenoir: 1933, c. 277; 1939, c. 63; Mecklenburg: 1933, c. 277; 1937, c. 386.

Editor's Note.—Prior to the 1921 amend-

ment this section read "upon affidavit, etc." instead of "upon written request, etc.," as it now stands.

§ 7-225. **Defendants bound by justice to recorder's court.**—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the recorder's court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the recorder's court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the county recorder's court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the recorder's court, and the case shall then stand for trial at the next succeeding term of said recorder's court as if the defendant had been bound over to the recorder's court in the first instance: and Provided further, that in the event any justice of the peace or other committing magistrate shall bind over to the recorder's court any person charged with an offense beyond the jurisdiction of said court, the said recorder shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1919, c. 277, s. 29; C. S., s. 1570; 1921, c. 110, s. 4.)

Local Modification. — Vance, Warren:
Pub. Loc. 1927, c. 438.

§ 7-226. **Notice to accused of transfer; trial; obligation of bond.**—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a county recorder's court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said recorder's court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the recorder's court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said recorder's court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the recorder's court, then the case shall not be tried without the consent of the accused person until the following term of the recorder's court. (1921, c. 110, s. 5; C. S., s. 1570(a).)

§ 7-227. **Trials upon warrants; by whom warrants issued.**—All trials of criminal causes in said court shall be upon warrant issued by the clerk of the superior court or deputy clerk provided for in this article, or by the recorder or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the recorder shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1919, c. 277, s. 30; C. S., s. 1571; 1921, c. 110, s. 6.)

Cited in *State v. Turner*, 220 N. C. 437,
17 S. E. (2d) 501 (1941).

§ 7-228. **Jury trial as in municipal court.**—In all trials in county recorders' courts, upon demand for a jury by the defendant or the prosecuting attorney representing the State, a jury shall be had in the same manner and under the same provisions as are set forth in this subchapter in reference to

municipal courts, so far as the same may be practically applicable to a county court. (1919, c. 277, s. 40; C. S., s. 1572.)

Local Modification.—Burke: 1931, c. 335; Orange: 1947, c. 214, s. 3; Pasquotank: Cabarrus: 1939, c. 347; Caldwell: 1951, c. 1941, c. 213; Pender: 1945, c. 60; Perquimans: 1929, c. 115; Halifax: 1945, c. 25; Randolph: 1951, c. 414; c. 628, s. 2; Henderson: 1933, c. 316; Hoke: Tyrrell: 1943, c. 177. Pub. Loc. 1937, c. 408; Martin: 1945, c. 113;

§ 7-229. Sentence imposed; fines and costs paid. — Whenever any person is convicted or pleads guilty of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which court is held, and he may assign him to work under the State Highway and Public Works Commission. Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the State. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; C. S., s. 1573; 1925, c. 308; 1945, c. 635.)

Cross Reference.—As to sentencing prisoners for work under the supervision of the State Highway and Public Works Com-

mission, see §§ 148-30 and 148-32.

Editor's Note.—The 1945 amendment rewrote the first sentence.

§ 7-230. Appeals to superior court.—Any person convicted of any offense of which the county recorder has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the recorder for any offense of which the court has not final jurisdiction shall, upon the recorder's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1919, c. 277, s. 33; C. S., s. 1574.)

Derivative Jurisdiction.—When the superior court sits upon an appeal from a judgment of a justice of the peace in a criminal action, or a judgment of a recorder's court under this section, it is sometimes said to be acting under the derivative jurisdiction of the court from which appeal is taken; the trial is had upon the warrant issued by the court which had jurisdiction and which is required to be

transmitted to the court with the return to the appeal. *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

Where the case is beyond the jurisdiction of the inferior court, it does not reach the superior court under this section by appeal, but by the process of "binding over," and in such case only is an indictment necessary. *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 7-231. Clerk of superior court ex officio clerk of county recorder's court.—The clerk of the superior court of any county in which a county recorder's court shall be established shall be ex-officio clerk of such court. He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto. Whenever the clerk of the superior court acts ex-officio as clerk of the recorder's court or general county court, any assistant clerk or deputy clerk of the superior court in his office shall have power and authority to take affidavits, issue warrants and other process, administer oaths to

witnesses and to perform any other duty in connection with said court under the direction of the clerk of the superior court, and for the acts of said assistant or deputy clerk, the clerk of the superior court shall be liable on his official bond to the same extent that he would have been liable if he had done the act himself. The preceding sentence shall not apply to recorder's courts in Bladen, Brunswick, Camden, Forsyth, Gates, Halifax, Martin, Moore, Perquimans and Vance counties. (1919, c. 277, s. 36; C. S., s. 1576; 1935, c. 346; 1947, c. 214, s. 5.)

Local Modification.—Columbus: 1925, c. 232; Mecklenburg: 1949, c. 955. amendment struck out "Orange" from the list of counties in the last sentence.

Editor's Note. — The 1935 amendment **Cited** in *State v. Boykin*, 211 N. C. 407, added the last two sentences, and the 1947 191 S. E. 18 (1937).

§ 7-232. Deputy clerk may be appointed.—Instead of having the clerk of the superior court to act ex-officio as clerk of the recorder's court or general county court, the board of commissioners of any county wherein a county recorder's court or general county court may be established may, at the time of the establishment of said court or at the time of fixing the county budget for any succeeding year, call upon the clerk of the superior court to appoint a special deputy to act as clerk of the recorder's court or general county court, and the clerk of the superior court shall within sixty days thereafter appoint a special deputy to act as clerk of the recorder's court or general county court, unless the time for good cause shall be extended by the board of county commissioners. Said special deputy clerk shall assist the clerk of the superior court with the duties of his office and shall have all the power and authority in reference to the county recorder's court or general county court conferred upon the clerk of the superior court by the preceding section, and he shall do all things in reference to said recorder's court or general county court under the direction of the clerk of the superior court of the county as fully as the clerk of the superior court would otherwise be authorized to do. The board of commissioners may require and fix the official bond of said special deputy clerk for the faithful performance of his duties and fix his salary, which shall be fixed before he enters upon his duties and shall not be lowered during his term of office. His term of office shall be for the same time as the term of the recorder of said court, unless he shall be sooner removed by the clerk of the superior court for cause, and shall cease at any time that the court itself shall cease to exist. This section shall not apply to Bladen, Brunswick, Camden, Forsyth, Gates, Guilford, Halifax, Lee, Martin, Moore, Perquimans and Vance counties. (1919, c. 277, s. 36; C. S., s. 1576; 1935, c. 346; 1947, c. 214, s. 5.)

Local Modification.—Mecklenburg: 1949, c. 955. rewrote this section, and the 1947 amendment struck out "Orange" from the list of counties in the last sentence.

Editor's Note. — The 1935 amendment

§ 7-233. Compensation of clerk when no deputy appointed.—When no deputy clerk is appointed or elected by the board of commissioners, they are authorized to pay annually to the clerk of superior court an amount fixed by the board, which shall be in addition to any salary or fees theretofore allowed by law to the clerk of superior court, and which shall be in compensation for the services rendered by him as clerk of the county recorder's court. Such compensation shall be paid to the clerk of superior court so long as he shall perform the duties of clerk ex officio of the county recorder's court. (1919, c. 277, s. 36; C. S., s. 1577.)

§ 7-234. Deputy clerk to take oath of office.—If any deputy clerk shall be appointed as provided in this article he shall take the oath required of deputy clerks under the general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article, both of which oaths shall be recorded in the office of the clerk of the superior court, and such deputy clerk is further authorized to perform all duties of deputy clerk

under the general law in addition to the duties set forth in this article. (1919, c. 277, s. 37; C. S., s. 1578.)

Cross Reference.—As to oaths required, see §§ 2-13, 11-6, 11-7, 11-11; Const., Art. VI, § 7.

§ 7-235. **Prosecuting attorney may be elected.**—The board of commissioners of any county availing itself of the provisions of this article may elect, at the same time, in the same manner, and for the same term as herein provided for the election of a deputy clerk, a prosecuting attorney for said court, and fix his compensation in such amount as they may deem suitable for the services to be rendered: Provided, that the board may require the county attorney to discharge the duties of prosecuting attorney in said court, and fix his compensation accordingly. (1919, c. 277, s. 38; C. S., s. 1579.)

Local Modification.—Montgomery: 1929 c. 112; Perquimans: 1951, c. 41; Washington: 1941, c. 164.

§ 7-236. **Fees for issuing and serving process.**—All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the recorder's court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1919, c. 277, s. 31; C. S., s. 1580.)

§ 7-237. **Costs and fees taxed as in municipal court.**—Except as provided in § 7-238, there shall be taxed in the county recorder's court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1919, c. 277, s. 39; C. S., s. 1581.)

Cross Reference.—See § 7-206.

§ 7-238. **Fees taxed when county officer on salary; recorder's court fund.**—In cases in which the recorder or judge and the solicitor of the county recorder's court shall be paid salaries, in lieu of fees for such recorder or judge or solicitor, the clerk of the recorder's court shall tax against the defendant who is convicted, or who confesses his guilt, or upon whom judgment is suspended in said court in cases originally within the jurisdiction of the justice of the peace a tax fee of three dollars in each case, and in all other cases within the jurisdiction of the said recorder's court a tax fee of six dollars, and these several sums when collected shall be paid over by said clerk to the treasurer or financial agent of the county, to be kept by him as a separate and distinct fund to be known as the recorder's court fund. This fund shall be used only in paying the salary of the recorder and prosecuting attorney of said court, and the other expenses of the court. (1921, c. 110, s. 13; C. S., s. 1598(a).)

§ 7-239. **Courts may be discontinued after two years.**—The board of commissioners of any county which has established a county recorder's court under the provisions of this article are authorized, after two years trial of the court, to discontinue the same at any time thereafter if in their judgment the public interest shall require it. If any such court shall be so discontinued, the action or resolution must be taken or adopted at least six months prior to the next general election, and shall not go into effect until the term of office of the recorder shall expire. (1919, c. 277, s. 35; C. S., s. 1582.)

ARTICLE 26.

Municipal-County Courts.

§ 7-240. **Established for entire county.**—The governing body of any municipality possessing a population of two thousand or over, according to the last federal census, in which the county courthouse is located, and the board of commissioners of the county, shall have the power, at a joint meeting of the two bodies, by joint resolution, in the manner hereinafter provided, to establish a recorder's court so as to include the entire county, outside of other municipalities therein possessing a population of two thousand or over. After the adoption of such joint resolution such municipal recorder's court shall possess all the powers and functions and exercise all the territorial jurisdiction in this subchapter conferred upon both municipal and county recorder's court under the procedure herein provided for, and subject to the provisions herein in reference to concurrent jurisdiction where a special or recorder's court exists under prior special acts in any portion of the county. (1919, c. 277, s. 41; C. S., s. 1583.)

Local Modification.—Richmond: 1941, c. 60.

§ 7-241. **Election of recorder.**—If the territorial jurisdiction of such municipal recorder's court is extended to the entire county, as set forth in the preceding section, then the first recorder shall be selected for the term and in the manner hereinbefore set forth, by a joint meeting of the governing body of such municipality and the board of commissioners of the county, and such recorder shall be thereafter nominated and elected as is provided for herein for the nomination and election of a county recorder. Such recorder shall be a resident of the municipality, and in all other respects the court shall be conducted under the proceedings herein provided for municipal courts. (1919, c. 277, s. 42; C. S., s. 1584.)

Local Modification. — Lenoir, Onslow, Sampson: 1925, c. 233; 1927, c. 170.

§ 7-242. **Mayor's jurisdiction continued, when.**—In case the jurisdiction of the recorder's court of any municipality in any county shall not be extended in the manner authorized in this article, and no county recorder's court shall be established therein, then the mayors of the various cities and towns in such county shall continue to have all the powers and functions and exercise all the jurisdiction now conferred upon such officials by the general law for municipal corporations. (1919, c. 277, s. 43; C. S., s. 1585.)

ARTICLE 27.

Provisions Applicable to All Recorders' Courts.

§ 7-243. **Appeals from justices of the peace.**—In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court. (1919, c. 277, s. 54½; C. S., s. 1597.)

Object.—One of the objects of this and related sections was to relieve the congested dockets of the superior court. *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645 (1933).

Under the general provisions of this sec-

tion, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the superior court in the counties affected by the act. *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645 (1933).

§ 7-244. **Offenders may be sentenced to city chain gang.**—In case any municipality possessing a population of two thousand or over, as provided for herein, in which a recorder's court shall be established pursuant to the pro-

visions of this subchapter, shall now or hereafter establish and maintain a city chain gang, or workhouse or other penal institutions for the imprisonment and working of city prisoners, any recorder may sentence any person convicted of any offense committed within said municipality and punishable by imprisonment, to be imprisoned and worked on such city chain gang, or in such workhouse or other penal institutions, for such time as the recorder may in his discretion determine in accordance with the law. (1919, c. 277, s. 44; C. S., s. 1586.)

Local Modification.—Richmond: 1941, c. 60.

Cross Reference.—See § 7-194 and note.

§ 7-245. Recorders' courts substituted for other special courts.—Wherever there has been established in any county, city, or town a recorder's court or other special court, which, under the provisions of this subchapter, might have been established hereunder, whether it shall possess exactly the same jurisdiction and functions or not, the board of commissioners of the county or the governing body of such city or town, or the governing body of such city or town and the board of commissioners of the county acting jointly, may abolish such existing court and adopt any one of the courts herein provided for by appropriate resolution of such boards. (1919, c. 277, s. 45; C. S., s. 1587.)

ARTICLE 28.

Civil Jurisdiction of Recorders' Courts.

§ 7-246. Civil jurisdiction may be conferred.—The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand inhabitants, in which city or town there has been established a municipal recorder's court, under the provisions of this subchapter, or in which there is a municipal recorder's court established by law, may confer upon such recorder's court jurisdiction to try and determine civil actions, as hereinafter provided, wherein the party plaintiff or defendant is a resident of such county, or is doing business in the county. Such jurisdiction may be conferred by resolution by the board of county commissioners of any county, entered upon their minutes, and the board of county commissioners of the county may likewise confer civil jurisdiction on the county recorder's court to try and determine civil actions as hereinafter provided wherein one or more of the parties, plaintiff or defendant, is a resident of said county or is doing business therein. (1919, c. 277, s. 47; C. S., s. 1589; 1921, c. 110, s. 7; 1933, c. 166.)

Local Modification. — Carteret: 1933, c. 379; Richmond: 1941, c. 60; Surry: Pub. Loc. 1927, c. 133, s. 1.

Editor's Note.—Prior to the 1933 amendment this section applied in cities or towns of not less than 10,000 "nor more than 25,000" inhabitants. The quoted clause was omitted by the amendment.

Constitutionality.—A similar statute au-

thorizing the board of commissioners of a county having a recorder's court to allot stated civil jurisdiction to said court by the adoption of a resolution to that effect was held to be unconstitutional as an unlawful delegation of legislative powers. *Durham Provision Co. v. Daves*, 190 N. C. 7, 128 S. E. 593 (1925).

§ 7-247. Extent of jurisdiction.—The jurisdiction of such municipal and county recorders' courts in civil actions shall be as follows: (a) Jurisdiction concurrent with that of the justices of the peace within the county; (b) jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars; (c) jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and costs does not exceed the sum of five hundred dollars. (1919, c. 277, s. 48; C. S., s. 1590; 1921, c. 110, s. 8.)

Local Modification. — Carteret: 1933, c. 379; Mecklenburg: 1933, c. 174.

§ 7-248. Procedure in civil actions.—The rules of practice, issuing and serving process, and filing pleadings shall conform, as near as may be, to the practice in the superior court: Provided, it shall not be necessary to file written pleadings in any action of which justices of the peace now have jurisdiction. The process shall be returnable directly to the court; and no civil process shall be issued by any recorder's court to any county other than that in which the court is located. (1919, c. 277, s. 56; C. S., s. 1591; 1921, c. 110, s. 9.)

Local Modification. — Carteret: 1933, c. 1-93.
379.

Cross Reference. — As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92,

Editor's Note.—Prior to the 1921 amendment it was necessary to file written pleadings in an action of which the justice of the peace had jurisdiction.

§ 7-249. Trial by jury in civil actions.—In all civil actions the parties shall be deemed to have waived a trial by jury unless demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of five dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. (1919, c. 277, s. 49; C. S., s. 1592; 1921, c. 110, s. 10.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408.

Editor's Note.—The amendment in 1921 changed the amount of the deposit from three to five dollars.

§ 7-250. Jurors drawn and summoned.—If a trial by jury is demanded, the recorder shall continue the cause until a day to be set, and the recorder, together with the attorneys for all parties, shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen, observing as nearly as may be the rule for drawing a jury for the superior court. The recorder shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. (1919, c. 277, s. 50; C. S., s. 1593.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408.

§ 7-251. Talesmen and challenges.—The recorder shall have the right to call in bystanders according to the practice in the superior court as nearly as the same is applicable, and each party shall have the same causes of challenge as in the superior court. (1919, c. 277, s. 51; C. S., s. 1594.)

Local Modification.—Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408.

§ 7-252. Jury as in superior court.—The jury shall be a jury of twelve, and the trial shall be conducted as nearly as possible as in the superior court. (1919, c. 277, s. 52; C. S., s. 1595.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408; Surry: Pub. Loc. 1927, c. 133, s. 2.

§ 7-253. Appeals to superior court.—Appeals may be taken from the recorder's court to the superior court of the county in term time, for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only one copy thereof shall be required. The time for taking and perfecting appeals shall be counted from the end of the term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder's court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the Supreme Court: Pro-

vided, that appeals from a county recorder's court to the superior court of the said county shall be tried de novo in the superior court. (1919, c. 277, ss. 53, 54; C. S., s. 1596; 1921, c. 110, s. 11.)

Editor's Note.—The 1921 amendment added the proviso at the end of this section.

§ 7-254. Enforcement of judgments.—Orders to stay execution shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the recorder's court may be enforced by executions issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court, as now provided for judgments of justices of the peace; and the judgment, when docketed, shall in all respects be a judgment of the superior court as if rendered by such court, and shall be subject to the same statute of limitations and the statutes relating to revival of executions: Provided, that a judgment of the recorder's court shall not be a lien upon real estate until docketed in the superior court. (1919, c. 277, s. 55; C. S., s. 1598; 1921, c. 110, s. 12.)

Editor's Note.—The 1921 amendment added the proviso at the end of this section.

§ 7-255. Costs in civil actions.—In all civil actions the clerk shall tax against the losing party the sum of three dollars in cases originally within the jurisdiction of the justice of the peace, and the sum of six dollars in all other cases, and all sums so collected shall be disposed of as provided for tax fees in criminal actions in § 7-238. (1921, c. 110, s. 13; C. S., s. 1598(a).)

Cross Reference.—See §§ 7-206 and 7-237.

ARTICLE 29.

Elections to Establish Recorders' Courts.

§ 7-256. Election required.—The courts provided for in this subchapter shall be established upon elections held as set forth in this article, except municipal recorders' courts which are established without a popular vote pursuant to the provisions of article 29A of this chapter, and except the governing body of any municipality having an estimated population of more than twenty thousand (20,000) on the first day of January, 1945, may establish municipal recorders' courts and/or the board of county commissioners of any county may establish county recorders' courts without a vote of the people. (1919, c. 277, s. 58; C. S., s. 1599; 1921, c. 110, s. 14; 1947, c. 840, s. 1; 1947, c. 1021, s. 1.)

Editor's Note.—The 1921 amendment added an exception clause relating to county recorders' courts. The 1947 amendments rewrote this section. For brief comment on amendments, see 25 N. C. Law Rev. 400.

§ 7-257. Municipal recorder's court.—The governing body of any city or town which may, under the terms of this subchapter, establish a court, prior to its establishment shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall be not less than thirty days nor more than two years from the passage of the resolution, at which election there shall be submitted to the qualified voters of the city the question of establishing such court. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 58; C. S., s. 1600; 1939, c. 201.)

Editor's Note.—The 1939 amendment substituted "two years" for "sixty days" formerly appearing in this section.

§ 7-258. Notice of election.—Notice of such election shall be given, signed

by the clerk of the city or town or the mayor thereof, containing in substance the resolution, the date of the election, and a reference to this subchapter, which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the city or town. (1919, c. 277, s. 59; C. S., s. 1601.)

§ 7-259. New registration may be ordered.—The governing body of such city or town may in its discretion order a new registration of the voters for any election authorized hereunder. (1919, c. 277, s. 60; C. S., s. 1602.)

§ 7-260. Manner of holding election.—The election shall be held, reported, and recorded in the city or town, under the laws governing general elections as near as may be applicable to the city or town. The result of the election shall be reported to, canvassed and declared by the governing body of the city or town, and recorded upon the minutes thereof. If the majority of the votes cast is declared in favor of such court, it shall be established, and not otherwise. (1919, c. 277, s. 61; C. S., s. 1603.)

Cross Reference.—As to general election laws, see § 163-148 et seq.

§ 7-261. Another election after two years.—If the majority of the votes cast at such election is against the court, another election for the same purpose may thereafter be called, but not within less than two years from the first or any succeeding election in reference thereto. (1919, c. 277, s. 62; C. S., s. 1604.)

§ 7-262. Municipal courts with jurisdiction over the entire county.—The courts provided for in article twenty-six of this subchapter shall be established in the following manner: The governing body of the city and the board of county commissioners of the county, at a joint meeting, shall pass a joint resolution calling an election submitting to the voters of the entire county the question of the establishment of said court. The election shall be conducted by the county commissioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, in so far as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the city. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 62; C. S., s. 1606.)

§ 7-263. Expense of elections paid.—The expense of conducting the elections for "municipal courts" and "municipal-county courts" shall be borne by the city or municipality concerned. (1919, c. 277, s. 63; C. S., s. 1607.)

§ 7-264. Certain districts and counties not included.—This subchapter shall not apply to the following judicial districts; the tenth, except as to Alamance, Granville and Orange counties; the eleventh; the seventeenth; the eighteenth, except as to Rutherford and Transylvania counties; the nineteenth; and the twentieth, except as to Cherokee, Haywood, Jackson and Swain counties; nor shall it apply to the counties of Chatham, Columbus, Johnston, New Hanover, and Robeson. (1919, c. 277, s. 64; C. S., s. 1608; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162; Pub. Loc. 1927, cc. 214, 545; 1929, cc. 17, 111, 114, 130, 340; 1931, cc. 3, 19; 1933, c. 142; 1935, c. 396; 1939, c. 204; 1941, c. 338; 1947, c. 1021, s. 2.)

Local Modification.—Alexander: 1939, c. 204; Halifax: 1931, c. 3; Hyde: 1935, c. 396; 1941, c. 134.

Editor's Note.—The 1947 amendment inserted the reference to Alamance County.

ARTICLE 29A.

Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

§ 7-264.1. **Establishment of municipal recorders' courts without election.**—(a) Notwithstanding the provisions of article 29 of this chapter, the governing body of any municipality authorized by this subchapter to establish a court may, by adoption of an appropriate resolution, create a municipal recorder's court after giving due notice and holding a public hearing with respect thereto.

(b) Such public notice shall set forth that the governing body is considering the creation of a municipal recorder's court without holding an election thereon and shall name a time and place for a public hearing thereon, at which time all interested persons may appear and be heard.

(c) Such notice shall be published at least once a week for four successive weeks in some newspaper published within the corporate limits of the municipality and shall be posted on the official bulletin board in the city hall of such municipality during the period of publication.

(d) After a public hearing is held pursuant to the provisions of this section, the governing body of the municipality is authorized, in its discretion, to establish a municipal recorder's court without holding an election thereon. (1947, c. 840, s. 2.)

SUBCHAPTER VII. GENERAL COUNTY COURTS.

ARTICLE 30.

Establishment, Organization and Jurisdiction.

§ 7-265. **Establishment authorized; official entitlement; jurisdiction.**—In each county of this State, there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this subchapter and which court shall be called the general county court and shall have jurisdiction over the entire county in which said court may be established. In any county in the State in which there is situated a city which has or may have in the future a population, according to any enumeration by the United States census bureau, of more than twenty thousand inhabitants, the commissioners of such county or counties are authorized hereby to establish general county courts as hereinafter provided without first submitting the question of establishing such court to a vote of the people: Provided, that the said enumeration need not be made at a regular decennial census. In the event that the second sentence of this section is acted upon by the commissioners of any county in establishing a general county court, as is herein provided, the said commissioners may make such provisions for holding such courts in such city. (1923, c. 216, s. 1; C. S., s. 1608(f); 1925, c. 242; 1927, c. 74.)

Local Modification.—Caswell: 1931, c. 17; 1933, c. 405; 1937, c. 54; Cherokee: Pub. Loc. 1927, c. 87; Henderson: 1927, c. 103; Richmond: 1941, c. 60, s. 1; Transylvania: 1931, c. 1; Wilson: 1931, c. 61; 1935, cc. 29, 149, s. 1.

Editor's Note.—See note to § 7-278.

In General.—Under this section the legislature may create courts inferior to superior court if provision is made for appeal to the superior court. *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741 (1932).

The establishment of a general county court by the board of commissioners of a county under the provisions of this and related sections, will not be held invalid

as being an unlawful exercise of legislative power, the jurisdiction of such courts being prescribed by the legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the legislature. *State ex rel. Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1933).

Enactment of Acts of Commissioners in Creating Courts.—The acts of the county commissioners in the organization of general county courts, heretofore organized, as provided by ch. 216 of the Public Laws of 1923 and ch. 85 of the Public Laws,

extra session 1924, and all amendments thereto, were ratified and declared to be the acts of the General Assembly of North Carolina by the Acts 1927, ch. 232, § 1.

§ 7-266. Creation by board of commissioners without election.—If in the opinion of the board of commissioners of any county, the public interests will be best promoted by so doing, they may establish a general county court under this article, by resolution which shall, in brief, recite the reasons for the establishment thereof, and further recite that, in the opinion of the board of commissioners, it is not necessary that an election be called upon the establishment of such court as herein provided for, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (Ex. Sess. 1924, c. 85, s. 2.)

Local Modification. — Henderson: 1927, c. 103; Person: 1929, c. 246.

Cited in *Efrd v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

§ 7-267. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution reciting in brief the reasons therefor, abolish said court: Provided, no such court shall be abolished except at the end of the terms of office of the judge and solicitor, unless such judge and solicitor shall voluntarily tender their resignations, setting forth, in brief, that in their opinion the existence of the said court is no longer necessary, in which event the board of commissioners may forthwith abolish the same. (Ex. Sess. 1924, c. 85, s. 2.)

Cited in *Efrd v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

§ 7-268. Transfer of criminal cases.—Upon the establishment of the general county court, as in this article authorized, the clerk of the superior court shall immediately transfer from the superior court to such general county court all criminal actions pending in the superior court of which the general county court has jurisdiction, as in this article conferred, and the general county court shall immediately proceed to try and dispose of such criminal actions. (Ex. Sess. 1924, c. 85, s. 2.)

Section 15-177 Modified.—This and related sections modify § 15-177. See *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645 (1933).

§ 7-269. Transfer of civil cases.—Transfers may be made in term of any civil action in the superior court to the general county court, and from the general county court to the superior court by the presiding judge of said respective courts, by consent, or upon motion of which due notice has been given, when, in the opinion of the presiding judge of the court from which the transfer is to be made, the ends of justice will be best served and promoted by such transfer. (Ex. Sess. 1924, c. 85, s. 2; 1933, c. 127.)

Editor's Note. — The 1933 amendment changed the 1924 act which authorized the judge of the superior court to transfer civil actions to the general county court for trial. The amendment allows the

judge of either the superior court or the general county court to transfer cases to the other court for trial, either by consent or by motion upon notice. 11 N. C. Law Rev. 216.

§ 7-270. Costs.—Costs in both criminal and civil actions shall be taxed and collected as now provided by law. (Ex. Sess. 1924, c. 85, s. 2.)

Local Modification.—Surry: 1949, c. 896, s. 2.

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.—The court shall be presided over by the judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in the county. The first judge of the court upon the establishment of said

court shall be elected by the board of county commissioners within thirty days after the establishment of said court, and he shall hold his office until January first, following the next general election of county officers and until his successor is elected and qualified. If a vacancy occurs in the office of judge of said court, the same shall be filled by the election of a successor for the unexpired term by the board of county commissioners. After the first elected judge by the board of county commissioners, each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office and when other county officers are elected, and shall hold his office for a term of four years beginning January first following his election, and until his successor is elected and qualified. Before entering upon the duties of his office, the judge shall take and subscribe an oath of office, as is now provided by law for justices of the peace, and he shall file the same with the clerk of the superior court of the county. The salary of said judge shall be fixed by the board of commissioners of the county, and shall not be decreased during the term of office, and it shall be paid monthly out of the funds of the county. The judge shall reside in the county and shall be provided by the county commissioners with an office at the county seat. The terms of said court shall be held in the courthouse, except as otherwise provided in § 7-265, but they shall at no time inconvenience or discommode the superior court of the county while the superior court in term is using the courthouse. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 2; C. S., s. 1608(g); Ex. Sess. 1924, c. 85, s. 1.)

Local Modification. — Duplin: 1943, c. 264; Scotland: 1925, c. 172; Surry: 1949, c. 896, s. 2.

Cross References.—As to forms of oaths required of justices of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7; Const., Art. VI, § 7.

Editor's Note. — The 1924 amendment struck out a provision fixing the salary at not less than \$3600, and a provision denying the judge the power to practice law in the courts of the State. It also added the

last sentence.

Election of Judge by Commissioners Constitutional.—Under the Const., Art. IV, § 30, the legislature may provide for the election of officers of inferior courts, and the word "election" does not necessarily import a popular election and the delegation to the county commissioners of the power to elect judges is not an unlawful delegation of legislative powers. *State ex rel. Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1933).

§ 7-272. Terms of court.—The court shall open for the transaction of business and trial of causes the first Monday of each month and continue until all matters before the court are disposed of. (1923, c. 216, s. 2; C. S., s. 1608(h).)

Local Modification. — Duplin: 1947, c. 899.

§ 7-273. Prosecuting officer; duties, election, salary, etc.—There shall be a prosecuting attorney of the general county court, to be known officially as prosecutor, who shall appear for the State and prosecute in all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of county commissioners. He shall be elected by the board of county commissioners for the first term as herein provided for the election of the judge, and thereafter by the qualified electors of the county in the same manner as is provided herein for the election of the judge; and vacancies in the office of the prosecutor shall be filled by the board of county commissioners as they are herein authorized to fill vacancies in the office of judge. If requested to do so by the judge, the prosecutor shall represent the county in prosecution of criminal appeals from this court in the superior court. The salary of the prosecutor shall be paid monthly out of the county funds. If in the opinion of the board of com-

missioners the best interests of the county will be promoted thereby, the said board may appoint such solicitor, fixing his term of office, in which event the solicitor so appointed shall hold office pursuant to such appointment, and shall not be elected by vote as herein provided for. (1923, c. 216, s. 3; C. S., s. 1608(i); Ex. Sess. 1924, c. 85, s. 1; 1925, c. 250, s. 1.)

Local Modification. — Duplin: 1943, c. \$1,000. The last sentence was also added 264; Henderson: 1927, c. 103. by the amendment.

Editor's Note. — This section was amended in 1924 by striking out a provision limiting the salary to a minimum of The 1925 amendment struck out the word "judge" in the last sentence and substituted the word "solicitor."

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc.

—The clerk of the superior court of the county shall be ex-officio clerk of the general county court, herein provided for, and in addition to the salary and fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix, to be paid monthly out of the county funds. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him to the same extent as he is bound as clerk of the superior court. The clerk of said court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: Alamance, Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Craven, Dare, Davidson, Duplin, Durham, Edgecombe, Forsyth, Halifax, Haywood, Henderson, Hertford, Hoke, Hyde, Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person, Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1923, c. 216, s. 4; C. S., s. 1608(j); 1931, c. 233.)

Local Modification. — Surry: 1949, c. 896, s. 2.

§ 7-275. **Sheriff; duties; additional allowance.**—The sheriff of the county or his deputy appointed shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior courts of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services in addition to his salary and fees fixed by law. (1923, c. 216, s. 5; C. S., s. 1608(k).)

§ 7-276. **Fees of clerk and sheriff.**—In those counties in which the clerk of the superior court and sheriff are paid fees, and not salaries, such clerk and sheriff shall receive the same fees for services rendered in the general county court as they would have received had such services been rendered in the superior court. (Ex. Sess. 1924, c. 85, s. 5½.)

Local Modification.—Scotland: 1925, c. 172.

§ 7-277. **Separate records to be kept by clerk; blanks, books and stationery.**—The clerk of the said general county court shall keep separate records, criminal and civil, for the use of said court, to be furnished by the county commissioners, and they shall also provide all such necessary blanks, forms, books and stationery as may be needed by said court. And the said clerk shall keep the same in his office of clerk of the superior court. (1923, c. 216, s. 6; C. S., s. 1608(1).)

§ 7-278. **Criminal jurisdiction, extent.**—The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

1. Original, exclusive and concurrent jurisdiction, as the case may be, of all offenses within said county which are now or may hereafter be given to justices of the peace under the Constitution and general laws of the State, including all offenses of which mayors of towns or other municipal courts now have jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime within the territory of the general county court, and of which said court is not herein given final jurisdiction.

3. To punish for contempt to the same extent and in the manner allowed by law to the superior courts of this State; to issue writs ad testificandum and other process to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this State.

4. The general county court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition thereto shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the general county court, as herein provided for, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance, or surety, to appear at the next first Monday of the month next succeeding before the general county court for trial, and in default of surety such person shall be committed to the county jail to await trial.

5. In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred upon such special courts. (1923, c. 216, s. 13; C. S., s. 1608(m); 1924, c. 85, s. 1.)

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note.—The fifth paragraph was added by the 1924 amendment.

In General.—This section as enacted was one of many general provisions applicable to the several courts provided by the act. The last clause has reference to the jurisdiction exercised by the statutory courts in all criminal matters arising in the county which are given to justices of the peace. *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645 (1933).

When the amendment of 1924 is construed in *pari materia* with both § 7-265 et seq., and § 7-185 et seq., it has a prospective purpose and means that when general

county courts exist or are created in counties where special courts for cities and towns shall be, or shall have been created, or are in contemporaneous existence, their jurisdiction shall be as defined in the amendment, that is, concurrent with the jurisdiction conferred upon such special courts. *In re Barnes*, 212 N. C. 735, 194 S. E. 499 (1938).

Warrant on Appeal.—Upon conviction in a county court of a misdemeanor within the final jurisdiction of such court, upon a warrant sworn out before a justice of the peace, on appeal the superior court has derivative jurisdiction to try defendant upon the same warrant without a bill of indictment found by the grand jury. *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447 (1942).

§ 7-279. Civil jurisdiction, extent.—The jurisdiction of the general county court in civil actions shall be as follows:

1. Jurisdiction concurrent with that of the justices of the peace of the county;
2. Jurisdiction concurrent with the superior court in all actions founded on contract;
3. Jurisdiction concurrent with the superior court in all actions not founded upon contract;

4. Jurisdiction concurrent with the superior court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

5. Jurisdiction concurrent with the superior court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions;

6. Jurisdiction concurrent with the superior court of all actions and proceedings for divorce and alimony, or either;

7. Jurisdiction concurrent with the superior court in all matters pending in said court for the appointment of receivers, as provided in § 1-501 et seq.;

8. Jurisdiction concurrent with the superior court to appoint receivers. (1923, c. 216, s. 14; C. S., s. 1608(n); 1935, c. 171; 1937, c. 58.)

Local Modification.—Bertie: 1935, c. 179.

8. See 12 N. C. Law Rev. 39.

Editor's Note.—The 1935 amendment added subsection 6 to this section, and the 1937 amendment added subsections 7 and

Cited in McLean v. McLean, 233 N. C. 139, 63 S. E. (2d) 138 (1951).

§ 7-280. Election, requirement of.—The general county court, herein provided for, shall be established upon elections as set forth in this article, except as otherwise provided in §§ 7-265 and 7-266. (1923, c. 216, s. 20; C. S., s. 1608(o).)

Cross Reference. — As to when court may be established without election, see §§ 7-265 and 7-266.

Cited in State ex rel. Meador v. Thomas, 205 N. C. 142, 170 S. E. 110 (1933).

§ 7-281. Resolution by county commissioners; time for election; ballots.—The board of commissioners of the county shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall not be less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the county the question of establishing such court. The form of the ballot shall be as provided in § 163-155, subsec. (e). (1923, c. 216, s. 21; C. S., s. 1608(p).)

§ 7-282. Notice of election; publication.—Notice of such election shall be given at least thirty days prior to the day of election, signed by the chairman of the board of county commissioners and containing in substance the resolution passed by the board, the date of the election and a reference to the act creating the court, and which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the county and a copy thereof shall be posted at the courthouse door. (1923, c. 216, s. 22; C. S., s. 1608(q).)

§ 7-283. Law governing elections; election officers; registration.—Any election held under the provisions of this law shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the members of the General Assembly, except as herein otherwise stated. The board of county commissioners shall appoint the registrars and judges of election and any other election officers necessary for holding said election, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for election of the members of the General Assembly, except as herein set forth. The said board of county commissioners may or may not, in their discretion, order a new registration for any election held under this law. In case no new registration is ordered the registration books of each voting precinct shall be kept open for twenty days prior to the election for the purpose of allowing electors to register who have not theretofore registered in the township or voting precinct, of their residence, and who are entitled to register for said election; and the registration books shall close on Saturday next preceding the

election and the registrar shall transcribe the names of all persons who have registered for former elections in their township, or voting precincts, and are otherwise qualified electors at said election upon a new registration book. The registrars are authorized and directed to register any person legally qualified and entitled to vote in their respective townships or voting precincts who apply for such purpose, in the same manner and under the same rules and regulations as now or hereafter may be provided for registering electors for the general election in said county. (1923, c. 216, s. 23; C. S., s. 1608(r).)

Cross Reference.—As to general election laws, see § 163-148 et seq.

§ 7-284. Count and return of votes; canvass of returns; effect; expense.—The vote cast at said election shall be counted at the close of the polls by the election officers and returned to the clerk of the said board of county commissioners of said county by a member of said election officers on the second day next succeeding the day of said election; and the said board of county commissioners, at their next regular meeting, or at a called meeting, shall tabulate and declare the result of the election, all of which shall be recorded in the minutes of said board of county commissioners, and no other recording and declaring of the result of said election shall be necessary. If a majority of the votes cast at said election is declared in favor of such court, it shall be established, and not otherwise. The expenses of said election shall be paid by the county commissioners out of the county fund. (1923, c. 216, s. 24; C. S., s. 1608(s).)

§ 7-285: Repealed by Session Laws 1949, c. 896, s. 1.

ARTICLE 31.

Practice and Procedure.

§ 7-286. Procedure; issuance and return of process.—The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the superior courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the State: Provided, that civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.

Motions for the change of venue or removal of cases from the general county courts to the superior courts of counties other than the one in which the said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the superior courts.

The provisions of the chapters on civil procedure and criminal procedure, and all amendments thereof, shall apply as nearly as may be to the general county courts, and the judges and the clerks of said courts, in all causes pending in said courts, shall have rights, privileges, powers and immunities similar in all respects to those conferred by law on the judges and clerks of the superior courts of the State, and shall be subject to similar duties and liabilities: Provided, that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the superior courts, except as provided in articles thirty and thirty-one of this chapter.

All motions and petitions for removal of actions from the general county court to the district court of the United States shall be presented to, be heard and determined by the judge of the general county court, with the right of appeal from any order or ruling of said judge to the superior court. (1923, c. 216, s. 7; C. S., s. 1608(t); 1925, c. 242, s. 2; 1925, c. 250, s. 2; 1933, c. 128, s. 1.)

Local Modification.—Richmond: 1941, c. 60. and the second 1925 amendment added the proviso at the end of the third paragraph.

Editor's Note.—The first 1925 amendment made several changes in this section. The 1933 amendment added the last paragraph.

§ 7-287. Trial by jury; waiver; deposit for jury fee.—In all civil actions the parties shall be deemed to have waived a jury trial unless demand shall be made therefor in the pleadings of the parties to the action when same are filed. The demand shall be in writing and signed by the party making it, or by his attorney, and accompanied by a deposit of three dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. Any defendant in a criminal action may demand a trial by jury, in which event such defendant shall not be required to deposit the sum of three dollars. Such jury shall be drawn as herein otherwise provided for. (1923, c. 216, s. 8; C. S., s. 1608(u); Ex. Sess. 1924, c. 85, s. 1; 1937, c. 56.)

Local Modification.—Duplin: 1937, c. 85. jury trial was required to be made "before the trial begins."

Editor's Note.—The last two sentences of this section were added by the 1924 amendment.

Cited in Crafford v. Lafayette Life Ins. Co., 198 N. C. 269, 151 S. E. 249 (1930).

Prior to the 1937 amendment demand for

§ 7-288. Continuance if jury demanded; drawing of jury; list.—If a jury trial is demanded, the judge shall continue the case until a day to be set, and the judge, together with the attorneys for all parties, shall proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen men, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. It shall be the duty of the register of deeds to prepare a list of jurors for this the general county court identical with the list prepared for the superior court, and the jury shall be drawn out of the box containing such list. Provided, that the judge of said court may in his discretion, if and when a sufficient number of cases are at issue in which jury trial has been demanded to warrant such action, cause a jury of not less than eighteen, not more than twenty-four men to be drawn for a certain week of a term, setting such cases for trial during such time, and in such cases the juries shall be drawn in the same manner as now provided for the drawing of juries for the superior court. The proviso shall not apply to the following counties: Alamance, Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Craven, Dare, Davidson, Duplin, Durham, Edgecombe, Forsyth, Halifax, Haywood, Henderson, Hertford, Hoke, Hyde, Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person, Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1923, c. 216, s. 9; C. S., s. 1608(v); 1931, c. 233, s. 2.)

§ 7-289. Talesmen; challenges.—The judge shall have the right to call in talesmen to serve as jurors according to the practice of the superior court as nearly as the same is applicable, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1923, c. 216, s. 10; C. S., s. 1608(w).)

§ 7-290. Process; authentication; service; return.—All civil summons in actions begun in the general county court shall be served at least ten days before the return day named therein, and shall be returnable on the first Monday of the month next succeeding the issue thereof, unless the same be issued within less than ten days before the first Monday of the month next succeeding its issuing, in which event it shall be made returnable on the first Monday of the second succeeding month next after the date of the issue thereof; and when the summons shall be issued more than ten days before the first Monday of the month next succeeding its issuing, and shall be executed by the proper officer within less than ten days of the return day named therein, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the first Monday of the month next succeeding the return day thereof, at which time it shall be treated in all respects as if that had been the return day named therein.

The summons shall run in the name of the State, be signed by the clerk of the court in which the action is brought, and shall be directed to the sheriff or other proper officer of the county. (1923, c. 216, s. 11; C. S., s. 1608(x).)

§ 7-291. Pleadings; time for filing.—The complaint shall be filed by the return day named in the summons and the answer, demurrer or other pleadings on the part of the defendant shall be filed within twenty (20) days thereafter: Provided, if a copy of the complaint be served on the defendant at the time of the service of the summons, then the defendant shall have only twenty (20) days from the date of such service to file an answer, demurrer or otherwise plead. If the answer contains a counterclaim against the plaintiff or plaintiffs or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is pleaded or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be pleaded shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim. If a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served as herein provided for, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer. For good cause shown and found by the judge, the judge may extend the time for the filing of any of the pleadings provided for in this article on the part of the plaintiff or on the part of the defendant. (1923, c. 216, s. 12; C. S., s. 1608(y); 1925, c. 250, s. 3.)

Editor's Note. — This section was other sections now appearing as §§ 1-125 amended in 1925 to make it conform to and 1-140.

§ 7-292. Criminal appeals to superior court; cases bound over to superior court.—Any person convicted of any offense of which the general county court has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the court in the same manner as is now provided for appeals from justices of the peace; and any person tried before the general county court for any offense of which said court has not final jurisdiction shall, if probable cause be found, be bound over to the superior court in the same manner as is provided by law in similar cases before a justice of the peace. The judge may, upon proper affidavit, issue criminal warrants returnable before him in or out of term. All persons convicted in said court may be sentenced to the roads, or county farms, or jail, as the judge may determine. (1923, c. 216, s. 15; C. S., s. 1608(z).)

§ 7-293. Amendments in pleadings and warrants.—The judge shall have power in his discretion to allow amendments in pleadings and warrants, to the same extent as is allowed in the superior courts of the State. (1923, c. 216, s. 16; C. S., s. 1608(aa).)

§ 7-294. Jury trials, conduct of.—The jury in the general county court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. (1923, c. 216, s. 17; C. S., s. 1608(bb).)

§ 7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to Supreme Court.—Appeals in civil actions may be taken from the general county court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the Supreme Court except that appellant shall file in duplicate statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the general county court to the superior court, as the complete record on appeal in said court; that briefs shall not be required to be filed

on said appeal, by either party, unless requested by the judge of the superior court; the record on appeal to the superior court shall be docketed before the next term of the superior court ensuing after the case on appeal shall have been settled by the agreement of the parties or by order of the court, and the case shall stand for argument at the next term of the superior court ensuing after the record on appeal shall have been docketed ten days, unless otherwise ordered by the court. The time for taking and perfecting appeals shall be counted from the end of the term of the general county court at which such trial is had. Upon such appeal the superior court may either affirm or modify the judgment of the general county court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the Supreme Court as is now provided by law. (1923, c. 216, s. 18; C. S., s. 1608(cc); 1933, c. 109; 1937, c. 84.)

Editor's Note.—Prior to the 1933 amendment the exception at the end of the first sentence of this section merely provided that the record might be typewritten and that only two copies should be required. This was omitted and the present exception and the provision as to briefs inserted in lieu thereof.

The 1937 amendment added that part of the first sentence beginning with the second semi-colon.

Assignments of Error.—In the absence of assignments of error appearing in the transcript on an appeal to the Supreme Court, the appeal will ordinarily be dismissed on the motion of the appellee. *Smith v. The Texas Co.*, 200 N. C. 39, 156 S. E. 160 (1930).

In the exercise of its appellate jurisdiction under this section, the Supreme Court may consider and pass only on the contention of the appellant that there was error in matters of law at the hearing in the superior court. This contention must, however, be presented to this court by assignments of error based on exceptions to specific rulings of the judge of the superior court, on the assignments of error appearing in the case on appeal filed in the superior court. *Smith v. The Texas Co.*, 200 N. C. 39, 156 S. E. 160 (1930).

Sending Record Up.—Where an appeal is taken from a county court under this section it is not desirable that the entire record in the superior court be sent up, but only such parts as relate to the questions to be reviewed with only material exceptions, properly stated, grouped and sufficiently compiled to enable the court to understand them without searching through the record. *Baker v. Clayton*, 202 N. C. 741, 164 S. E. 233 (1932).

See 11 N. C. Law Rev. 217, where it is pointed out that the 1933 amendment changes this section, so that instead of following the practice in appeals from the superior court to the Supreme Court, the appellant may file in duplicate the statement of the case on appeal, and this with the original records in the case shall be

transmitted to the clerk of the superior court as the complete record on appeal. Briefs are not required to be filed by either party, unless requested by the judge of the superior court.

Superior Court Sits as Appellate Court.—In hearing civil cases on appeal from the general county court, the superior court sits as an appellate court, subject to review by the Supreme Court. *Jenkins v. Castelloe*, 208 N. C. 406, 181 S. E. 266 (1935), citing *Cecil v. Snow Lbr. Co.*, 197 N. C. 81, 147 S. E. 735 (1929).

The jurisdiction of the superior court on an appeal from a general county court is an appellate jurisdiction limited to matters of law only which are properly presented by errors assigned, and the superior court may either affirm or modify the judgment of the general county court or remand the cause for a new trial. *Robinson v. McAlhanev*, 216 N. C. 674, 6 S. E. (2d) 517 (1940).

In Granting New Trial Superior Court Must State Rulings on Exceptions.—Where an appeal is taken from the general county court to the superior court for errors assigned in matters of law, as authorized by this section, and a new trial is granted by the superior court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court, they may be separately assigned as error in accordance with Rule 19(3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. *Jenkins v. Castelloe*, 208 N. C. 406, 181 S. E. 266 (1935).

Dismissal of Appeal.—Where the record is not docketed in the superior court within the time prescribed, the appeal is properly dismissed. *Grogg v. Graybeal*, 209 N. C. 575, 184 S. E. 85 (1936).

The superior court has discretionary authority to reinstate an appeal from a general county court upon motion made at the same term the appeal is dismissed for failure of appellant to comply with the statutory requirements governing such

appeals. This section provides that such appeals shall be governed by the rules for appeals from the superior court to the Supreme Court, and such procedure is provided by the Rules of Practice in the Supreme Court (Rule 17), and the superior

court obtains jurisdiction through the motion to reinstate aptly made, and may pass upon the motion at that or a subsequent term. *West v. Woolworth Co.*, 214 N. C. 214, 198 S. E. 659 (1938).

§ 7-296. Enforcement of judgments; stay of execution, etc.—Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to same extent as if rendered by the superior court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1923, c. 216, s. 19; C. S., s. 1608(dd).)

Docketing of Judgment Gives Superior Court Jurisdiction.—When the judgment of a general county court is docketed in the superior court of the county it becomes a judgment of the superior court in like manner as transcribed judgments of justices of the peace under § 7-166, and the general county court has no further jurisdiction of the case, and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936).

In an action for subsistence without divorce tried in the general county court, judgment was rendered in favor of plaintiff, which judgment was duly docketed in the office of the clerk of the superior court of the county. Thereafter order was entered in the general county court reducing the amount of the monthly allowance.

Upon the abolition of the general county court, the judge thereof, pursuant to previous notice given to the county bar, entered a general order transferring all cases then pending to the superior court of the county. Thereafter defendant failed to further comply with the orders for the payment of subsistence and plaintiff moved in the superior court for an order that defendant show cause why he should not be adjudged in contempt and for an order increasing the amount of subsistence. Defendant entered a special appearance and demurred to the jurisdiction of the superior court. It was held that upon the docketing of the judgment in the superior court, it acquired jurisdiction of the cause, and defendant's demurrer to the jurisdiction was properly overruled under this section. *Brooks v. Brooks*, 220 N. C. 16, 16 S. E. (2d) 403 (1941).

ARTICLE 32.

District County Courts.

§ 7-297. May be established in two or more contiguous counties in same judicial district; jurisdiction.—In any two or more contiguous and adjoining counties of any judicial district of this State there may be established, under the general powers and authority contained in articles thirty and thirty-one, of this chapter, except as herein otherwise provided, a court of civil and criminal jurisdiction, maintained pursuant to this subchapter and the said articles thirty and thirty-one, not inconsistent herewith, a court of record, to be known as and designated a district county court, and containing all the authority, jurisdiction, rights, powers and duties, compensations and fees, as provided in the articles aforesaid, except as herein otherwise provided. (1931, c. 70.)

Local Modification.—Richmond: 1941, c. 60.

§ 7-298. Judge of court; election; term of office; oath of office and salary.—The court shall be presided over by a judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in one of the counties composing the said district county court.

The first judge of said court, upon its establishment as hereinafter provided, shall be elected by the several boards of commissioners of the counties establishing the said district courts, each board being entitled to one vote to be cast in accordance with the majority vote of each board, at any joint meeting of said boards of commissioners, as hereinafter provided, within sixty days after the establishment, and he shall hold his office until January first, following the next general election of county officers, and until his successor is elected and qualified. Any vacancy arising in the office of judge of said court shall be filled by the several boards of commissioners of the counties establishing the said district court, in joint meeting assembled, which shall be called by the chairman of the board of commissioners of the county in which such judge resided at the time of his death or removal, or resignation.

At the joint meeting of said boards of commissioners when an election of the judge of said court is made, the said commissioners shall also fix the salary of said judge, which salary together with the salary of the prosecuting attorney hereinafter provided for shall be paid from the costs taxed and collected in the trial of all actions in said court to which costs provided for there shall be added a trial fee of five dollars and if there be a deficiency in the payment of said salaries from said costs as herein provided for, the said deficiency shall be proportionately paid by the several counties composing the said district county court, in proportion as the population of each county shall bear to the whole of the counties creating said court, on the basis of the most recent federal decennial census.

The judge shall reside in one of the counties of said district; he shall take the oath of office prescribed in § 7-271; hold his terms of court in the county courthouse in each county of his district, and shall not be permitted to practice law during his tenure of office in any of the courts of the State.

His successor shall be nominated and elected by a vote of the qualified electors of the several counties embraced within the jurisdiction of said district at the next general election before the expiration of the term of office and when other county officers are elected, in the same manner, and as provided by law for the nomination and election of judges of the superior court, and he shall hold his office for a term of four years beginning January first next following his election, and until his successor is elected and qualified; except, however, in instances of an appointment to fill a vacancy, in which case he shall hold through the unexpired term of his predecessor in office, and until his successor is elected and qualified. (1931, c. 70; 1943, c. 543.)

The 1943 amendment struck out the words "one thousand nine hundred thirty census" at the end of the third paragraph

of this section and inserted in lieu thereof the words "most recent federal decennial census."

§ 7-299. Present county courts may be changed to district courts.—In any county where a county court has been heretofore created and now exists under and by virtue of article thirty, of this chapter, where it is desired to change said court from a county court to a district county court, under the provisions of this article, its board of commissioners may, by proper resolution, reciting in brief the reasons therefor, abolish the said county court and establish for said county, in the manner provided in this article, a district county court; and in such event, the judge and solicitor of the said county court shall thereupon be named and elected as judge and solicitor of said district county court until the expiration of the time for which they were elected as officers of the said county court, and until their successors are duly elected and qualified. (1931, c. 70.)

§ 7-300. When court to be held.—The court shall be open for the transaction of business and trial of cases at least once a week in each county in each month in districts composed of four counties, or less, and at least once in every eight weeks in districts composed of more than four counties, which week or the time of holding said court for each of said counties shall be determined and de-

clared by said joint meeting of said commissioners upon recommendation of the bars of the several counties composing said district, or majority of the resident lawyers of said counties, and certified by said commissioners to each superior court clerk of the several counties within the district. (1931, c. 70.)

§ 7-301. Prosecuting attorneys.—There shall be a prosecuting attorney of the said district court, known officially as the prosecuting attorney, and he shall appear for the State and prosecute all criminal actions in said county courts of his district; and for his services he shall be paid such salary as may be fixed by the boards of county commissioners of the several counties composing the district.

The said prosecuting attorney shall be elected by the respective boards of commissioners in the same manner as hereinbefore provided for the election of a judge thereof. He shall hold his office until January first next following the first general election for county officers, and at the said first general election following his election by the said boards of commissioners, and thereafter at each subsequent general election for county officers, he shall be nominated and elected by the duly qualified electors of the counties composing said district, under the general laws governing the nomination and election of district officers, or solicitors of the several judicial districts.

Any vacancy arising in the said office of prosecuting attorney shall be filled by the board of commissioners of the counties composing the district, in the same manner as hereinbefore provided for the election of the judge thereof; and the compensation or salary of the said prosecuting attorney shall be paid by the several counties composing the district in the same proportion, or basis provided for payment of the salary of the judge, and shall be payable monthly out of the funds of the counties composing said district court. If requested to do so by the judge, the prosecuting attorney shall represent the county in prosecuting any appeal of a criminal action from said district court in the superior court. (1931, c. 70.)

§ 7-302. Clerks; duties and compensation.—The several clerks of the superior court in the several counties of said district court shall ex-officio be clerk of said district court of each and all terms held within the respective counties of each, and subject to all the rights, duties and liabilities provided for in §§ 7-274 and 7-277. The clerk of said court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: Alamance, Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Craven, Dare, Davidson, Duplin, Durham, Edgecombe, Forsyth, Halifax, Haywood, Henderson, Hertford, Hoke, Hyde, Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person, Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1931, cc. 70, 233.)

§ 7-303. Sheriffs; duties and compensation.—The several sheriffs of the several counties of said district court, or their duly constituted deputies, shall attend upon each term of this court within their respective counties, and be subject to and possess the same power and authority and additional compensation as authorized under § 7-275. (1931, c. 70.)

§ 7-304. Jurisdiction.—The said county district courts shall have the same criminal and civil jurisdiction as that of the general county court, and as fixed and defined in §§ 7-278 and 7-279. (1931, c. 70.)

§ 7-305. Procedure to establish.—Upon a petition signed by a majority of the resident licensed attorneys at law, of not less than two counties of the State within any one judicial district, and duly verified to that effect, addressed

to and filed with the Governor, praying the establishment of a general county district court for any two or more of the counties named in the petition, the Governor shall transmit a copy of the petition to each of the respective boards of county commissioners, and at the same time he shall issue an order to each of said boards directing a joint meeting of the same at the courthouse of one of the said counties at such time and place as he may designate in said order.

The several boards of commissioners, or any two or more of them, if in their judgment the said court shall be established, shall, at such meeting, or at such later meeting within thirty days thereafter to which they may adjourn, pass a resolution reciting the petition for said court, and declaring the same to be established in and for each of the respective counties thus approving and voting for the said resolution.

A majority vote of two or more of the several boards of commissioners participating in the said proceedings for the passage of the said resolution shall be sufficient for the establishment of said court, and it shall thereupon become an established court in and for the counties voting for the resolution; and thereupon a certified copy of the minutes of said meeting, the said petition and resolution, executed by any one of the commissioners present, attested by one member of each of the several boards participating in the said proceedings and voting for said court, shall be transmitted to the clerk of the superior court of the several counties participating and adopting the resolution, and also recorded in the minutes of said commissioners' meetings of the several counties composing the district. (1931, c. 70.)

§ 7-306. Practice and procedure.—The practice and procedure of the said county district courts shall be the same as that of the general county court, and as prescribed in §§ 7-286 to 7-296. (1931, c. 70.)

§ 7-307. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under the provisions of this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution, reciting in brief the reasons therefor, duly certify the same to the chairman of the board of commissioners of each other county composing, forming and creating the said district court; whereupon the respective boards of commissioners of the several counties embraced in said district court, shall meet at the courthouse of the county in which the judge resides on the third Monday of the month next following the receipt of the certified copy of the resolution aforesaid, or the subsequent and next following Monday first and abolish the said county court for the county having adopted the resolution aforesaid, which shall go into effect as to the county abolishing said court at the end of the term to which the judge has been elected. If, upon the abolition of the said county court, as to the county adopting the resolution aforesaid, as many as two other counties forming, composing and making up the said district court, desire the same continued in full force and effect within their respective counties the said commissioners shall readjust the salary and compensation of the judge and prosecuting attorney of said court on the basis hereinbefore provided to take effect at the end of the term to which the said judge has been elected, and the said county court shall continue in full force and effect within the other counties remaining, forming and composing the same, with no impairment of the rights, powers, duties, and authorities conferred by this article. But said court may, at any time, at a meeting held pursuant to a resolution, certified as aforesaid, subject to the provisions hereinbefore recited, abolish the said court in each, all or any of the counties in the districts; and in such event the clerk of court shall transfer all cases pending therein to the superior court of his respective county. (1931, c. 70.)

SUBCHAPTER VIII. CIVIL COUNTY COURTS.

ARTICLE 33.

With Jurisdiction Not to Exceed \$3000.

§ 7-308. **Establishment.**—An inferior court with civil jurisdiction only as hereinafter provided may be established by the board of county commissioners of any county in this State upon the petition of a majority of the resident practicing attorneys within the county. (1925, c. 135, s. 1.)

§ 7-309. **Jurisdiction.**—The said court shall have exclusive original jurisdiction in all civil actions, matters, and proceedings, including all proceedings whatever ancillary, provisional and remedial to civil actions founded on contract or tort, wherein the superior court now has exclusive original jurisdiction: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars (\$3,000).

Said court shall have jurisdiction concurrent with the superior court in all actions to try title to land and to prevent trespass thereon and to restrain waste thereof: Provided, the sum demanded or the value of property in controversy shall not exceed three thousand dollars (\$3,000).

The said court shall have jurisdiction with the superior court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: Provided, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars (\$3,000). (1925, c. 135, s. 2.)

§ 7-310. **Juries in such court; drawing jury; challenges.**—In the trial of civil actions in said court either the plaintiff at the time of filing the complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the superior court; failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury. The judge of said court, when in his opinion the ends of justice would be best served by submitting the issues to the jury, may have a jury called of his own motion and submit to it such issues as he may deem material.

Jurors shall receive the same compensation as is now provided by law for jurors serving in the superior court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court; the clerk of said court shall tax the sum of three dollars as cost of jury in all jury cases and the same shall be collected by said clerks and paid into the county treasury of said county.

The commissioners of said county at their regular meeting on the first Monday of April, in the year nineteen hundred and twenty-five, and each two years thereafter, shall cause names of their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose which must have two divisions marked "No. 1" and "No. 2," respectively, and two locks to same, the keys of one to be kept by the sheriff of said county and the other to be kept by the chairman of the board of commissioners of said county, the box to be kept by the clerk of said board, which box shall be marked "County Court." The names in this box shall be drawn for juries acting as jurors in the said county court and when a jury is demanded in said court the sheriff shall cause to be drawn from said box out of partition "No. 1," by a child not more than ten years of age fifteen scrolls and the scrolls so drawn to make the jury shall be put into partition marked "No. 2," and in all other respects the jury shall be drawn as juries are drawn in the superior court. The jurors of this court shall have the same qualifications as provided for jurors in the trial of causes in the superior court. The said jurors shall be summoned to attend under the mandate from the clerk of said county court directed to the sheriff of said county: Provided, that for sufficient cause the judge of this court

may issue an order to the board of county commissioners that no jury be drawn for such term or terms of this court, as may seem best to him.

The challenges allowed in the trial of causes in said county court shall be the same in number and for the same causes as are allowed in the trial of causes in the superior court; all jurors drawn from the box shall be regular jurors. The said court shall have the same power to summon tales jurors as the superior court now has and when a jury trial is had the jury shall be twelve in number. (1925, c. 135, s. 3.)

§ 7-311. Terms; docket.—The judge and clerk of said county court are hereby authorized to fix the terms of said court and to make up the docket of said court upon consulting with the bar association of said county. (1925, c. 135, s. 4.)

§ 7-312. Witnesses; how summoned.—Witnesses shall be summoned by subpoena issued by the clerk of said court as now provided for the summoning of witnesses for the trial of causes in the superior court and shall be allowed the same compensation to be taxed as cost by the clerk of this court. (1925, c. 135, s. 5.)

§ 7-313. Appeals.—Appeals may be taken by either the plaintiff or the defendant from the said county court to the superior court of said county in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the superior court to the Supreme Court, with the exception that the record may be typewritten instead of printed and only one copy thereof shall be required. The time for taking and perfecting the appeals shall be counted from the end of the term. Upon appeals from said county court the superior court may either affirm, modify and affirm the judgment of said county court or remand the cause to the county court for a new trial.

The bonds to stay executions shall be the same as now required for appeals from the superior court to the Supreme Court. The judgment of the superior court shall be certified to said county court; final judgment may be rendered unless there is an appeal to the Supreme Court. In case of appeal to the Supreme Court upon filing of the certificate from the Supreme Court to the superior court said certificate shall be transmitted by the clerk thereof to the clerk of this court. (1925, c. 135, s. 6.)

Necessity of Serving Statement of Case, etc.—An appeal to the superior court from the granting or refusal of a restraining order by the county court may be taken to the next term of the superior court without the necessity of serving statement of case on appeal, counterclaim or excep-

tions, etc., the case having been heard on the pleadings and record in the superior court consisting of the summons, complaint, answer, orders, judgment and assignment of errors. *Thomason v. Swenson*, 204 N. C. 759, 169 S. E. 620 (1933).

§ 7-314. How actions commenced.—All actions shall be commenced in said court by summons running in the name of the State and issued by the clerk of said county court and shall be returnable as is provided by law for summons in the superior court. The plaintiff shall file complaint on or before the return day of such summons; the defendant shall file a written answer or demurrer and shall make his motions in writing during the term to which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7; 1947, c. 781.)

Editor's Note.—The 1947 amendment appearing after the word "file" the first struck out the words "and retain" formerly time it appears in the second sentence.

§ 7-315. Judgments.—The judgments of said court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of said judgments shall be docketed in the superior court of said county and become judgments of the superior court as now provided for executions and

transcripts of judgments from the courts of justices of the peace with the same limitations as are now provided for judgments of justices of the peace. (1925, c. 135, s. 8.)

Cross Reference.—As to docketing judgments of courts of justices of the peace in superior court, see § 7-166.

§ 7-316. **Process of the court.**—The process of said court while exercising the jurisdiction of a justice of the peace shall not run outside of said county. In all other cases these processes shall run as processes issue out of the superior court. (1925, c. 135, s. 9.)

§ 7-317. **Removal of cause before justice.**—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace in said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause may be removed for trial to the said county court. (1925, c. 135, s. 10.)

Local Modification. — Mecklenburg:
1933, c. 279.

§ 7-318. **Rules of practice.**—The rules of practice as prescribed by law for the superior court for the trial of all causes shall apply in this court, supplemented, however, by such rules and regulations as may be prescribed by the judge of this court relating to causes pending therein. (1925, c. 135, s. 11.)

§ 7-319. **Bonds for costs; duties of clerk.**—The statutes about bonds for costs and about suits without bonds for costs that now apply to the superior court shall also apply to this court. Wherever the statute provides for a thing to be done by the clerk of the superior court or by the judge of the superior court or by either, the same thing shall be performed by the clerk of said county court or by the judge of said county court in causes in said county court; this provision shall apply especially to all provisional remedies as now provided by statute except special proceedings. (1925, c. 135, s. 12.)

§ 7-320. **Costs.**—In all causes removed to or brought into the said county court the costs shall be the same as in the superior court. All cost shall be paid to or collected by the clerk of said county court in the same manner as in the superior court and be paid by the said clerk of said county court into the treasury of said county: Provided, that for the service of process the fees shall be paid to the officer serving the process. The officers shall perform all the duties in said county court as provided in the superior court and receive therefor the same fees as allowed for the same service performed in the superior court. (1925, c. 135, s. 13.)

§ 7-321. **Appointment and compensation of judge; substitute; vacancies.**—After the ratification of this article and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor who shall appoint a judge to preside over such court, and each fourth year thereafter it shall be the duty of the Governor to appoint the judge of each such county court who shall preside over said court, who shall be learned in the law, of good moral character, and who shall at the time of his appointment and qualification be an elector in and for said county; that the said judge shall hold office for a term of four years and until his successor is appointed and qualified. And before entering upon the duties of his office the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the superior court and file the same with the clerk of the superior court of said county; and the said clerk shall record the same. Said judge shall receive a salary of one hundred dollars (\$100) a week for each week that he is engaged in holding court, payable in equal weekly installments out of the treasury of said county.

The said judge shall not by reason of his office be prohibited from practicing the profession of attorney at law in other courts of this State except as to matters pending in connection with or growing out of said county court.

When the said judge is unable to preside over said court on account of sickness or absence for other cause he shall appoint some other person learned in the law who shall take the same oath and possess the same qualifications as provided for the judge, to act as a substitute judge with all the powers and duties of the judge, and the compensation of said substitute judge shall be paid by the said judge.

Any vacancy occurring in the office of judge shall be filled by the Governor of the State. (1925, c. 135, s. 14.)

Cross References.—As to forms of oath 11-6, 11-7, 11-11. And see Const., Art. VI, required of superior court judges, see §§ § 7.

§ 7-322. **Compensation of clerk; vacancy; files, books, stationery, etc.**—The clerk of the superior court of said county by himself or his deputies shall ex officio perform the duties of clerk of said county court and shall be paid a sum not less than one thousand dollars (\$1,000) annually, the amount to be determined by the board of commissioners of said county and paid out of the treasury of said county as full compensation for his duties as clerk of said county court. Upon the failure of the clerk of the superior court of said county to qualify under this article or in case of any vacancy in the office of clerk of the said county court such vacancy shall be filled by the board of commissioners of said county. The necessary files, books, stationery and other material of that nature shall be furnished to the clerk of said county court by said county. (1925, c. 135, s. 15.)

§ 7-323. **Stenographer; fees.**—There shall be an official stenographer of this court whose duty shall be the same as the official stenographer of the superior court of said county. Said stenographer's fees shall be the same in amount as the fees of the official stenographer of the superior court of said county and shall be taxed as costs. (1925, c. 135, s. 16.)

§ 7-324. **Procedure.**—The procedure of said county court, except that hereinbefore provided, shall follow the rules and principles laid down in the chapter on civil procedure and amendments thereto in so far as the same may be adapted to the needs and requirements of the said county court. (1925, c. 135, s. 17.)

§ 7-325. **Records.**—There shall be dockets, files, and records kept of all proceedings in the said county court, conforming as nearly as possible to the records of the superior court. (1925, c. 135, s. 18.)

§ 7-326. **To be court of record.**—The said county court shall be a court of record and the clerk thereof shall be provided with a seal of said court. (1925, c. 135, s. 19.)

§ 7-327. **Pending cases.**—All cases pending in the superior court of said county and in the courts of the justices of the peace of said county on the date the court is established shall be tried in the courts wherein they are pending. (1925, c. 135, s. 20.)

§ 7-328. **First session.**—The presiding judge of said county court shall hold the first session of said county court within thirty days after his appointment by the Governor, and other sessions shall be held as provided in this article. (1925, c. 135, s. 21.)

§ 7-329. **Discontinuance of court.**—The board of commissioners of any county may discontinue such court on written petition signed by the majority of the practicing attorneys of such county. (1925, c. 135, s. 22.)

§ 7-330. **Existing laws not repealed.**—This article shall not be construed to repeal chapter seven, nor shall it repeal or affect any act establishing any inferior court now existing or that may hereafter be created under the existing law but shall be construed to be supplemental to the existing law and a method by which county courts may be established. (1925, c. 135, s. 23.)

§ 7-331. **Article not applicable to certain counties.**—The provisions of this article shall not apply to the following counties: Alexander, Alleghany, Anson, Avery, Bladen, Burke, Caldwell, Catawba, Cherokee, Clay, Craven, Davie, Duplin, Graham, Haywood, Henderson, Hoke, Hyde, Jackson, Johnston, Lincoln, Macon, Madison, Mitchell, Onslow, Pamlico, Pender, Person, Robeson, Scotland, Stokes, Swain, Vance, Watauga, Wilkes and Yancey: Provided, this article shall not apply to any of the counties of the present sixteenth and seventeenth judicial districts. (1925, c. 135, s. 24.)

ARTICLE 34.

With Jurisdiction Not to Exceed \$5000.

§ 7-332. **Establishment.**—In addition to the plan for a general county court provided for in articles 30 and 31, of this chapter, there may be established by the board of county commissioners in any county, a court of civil jurisdiction, which shall be a court of record and which shall be maintained pursuant to this article, and which court shall be called the county civil court, and shall have civil jurisdiction as provided in this article. (1925, c. 167 s. 1.)

§ 7-333. **Qualification, election, and term of judge; office.** — The county civil court shall be presided over by a judge, who may be an attorney at law, and shall reside and be a qualified elector in the county during his term of office, and shall be permitted to practice law during his term of office. The first judge of the county civil court shall be elected by the board of county commissioners at the time of the establishment of said court, and he shall hold his office until January first, following the next general election of county officers within said county, and until his successor is elected and qualified, and if a vacancy occurs in the office of judge, it shall be filled by the election of a successor for the unexpired term by the board of county commissioners. Each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office in the same manner as other county officers are nominated and elected, and shall hold office for a term of four years, beginning January first, following his election and until his successor is elected and qualified, unless said court is abolished. The judge shall qualify by taking and subscribing an oath of office as is now provided by law for a judge of the superior court, which shall be filed with the clerk. The salary of said judge shall be fixed by the board of commissioners of the county, which shall not be decreased during the term of office; to be paid in monthly installments by the county. The judge shall be provided by the county board of commissioners with an office and a suitable and convenient room for holding court at the county seat. (1925, c. 167, s. 2.)

Cross References.—As to forms of oaths 11-6, 11-7, 11-11. And see Const., Art. VI, required of superior court judges, see §§ § 7.

§ 7-334. **Substitute judge.**—When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification, or other cause, he shall appoint some other person learned in the law, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge, and his compensation during his appointment shall be paid by the said judge. (1925, c. 167, s. 3.)

§ 7-335. **Terms of court; calendar.**—The court shall open for the trans-

action of business and trial of cases on the first Monday of each month and continue until the matters of the court are disposed of, and it shall be the duty of the judge to prepare a calendar of cases for trial, on which jury cases shall have precedence. (1925, c. 167, s. 4.)

§ 7-336. **Clerk of court.**—The clerk of the superior court of the county shall be ex-officio clerk of the court, and in addition to the salary or fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix to be paid monthly out of the county funds, and the board of county commissioners are hereby authorized and empowered to provide for salary or fees for such additional deputies as he may need. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk, to the same extent as he is bound as clerk of the superior court. (1925, c. 167, s. 5.)

§ 7-337. **Sheriff.**—The sheriff of the county, or his deputies, appointed, shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services, in addition to his salary or fees fixed by law. (1925, c. 167, s. 6.)

§ 7-338. **Records; blanks, forms, books, stationery.**—The clerk of the court shall keep separate records for the use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery as may be needed by the court, and the clerk shall keep the same in the office of the clerk of the superior court. (1925, c. 167, s. 7.)

§ 7-339. **Juries.**—The jury in said court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. In all actions the parties shall be deemed to have waived a jury trial, unless demand shall be made therefor, as hereinafter provided, in writing. The plaintiff in filing the complaint, or the defendant at the time of filing answer, may in the pleadings demand a jury trial, or in cases transferred from the superior court to the said court, either party may demand jury trial, in writing, signed by the party making it or his attorney, which must be made at the time of such transfer. Any demand for a jury trial shall be accompanied by a deposit of five dollars (\$5.00), to insure the payment of the jury tax, except in cases brought in forma pauperis, provided such demand shall not be used to the prejudice of the party making it. (1925, c. 167, s. 8.)

§ 7-340. **Jury list; summons.**—It shall be the duty of the board of county commissioners, upon the establishment of a court as herein provided, and every two years thereafter, to prepare a list of jurors, identical with the list prepared for the superior court and subject to the same rules and regulations, and mark said jury box as the county civil court box, from which the jury shall be drawn. The judge of the court shall issue the proper writ to the sheriff of the county to summons the jurors for the court in the same manner as juries are ordered and drawn in the superior court. (1925, c. 167, s. 9.)

§ 7-341. **Talesmen.**—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to summons a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1925, c. 167, s. 10.)

§ 7-342. **Procedure, process, pleadings, etc.**—The procedure, practice, processes, pleadings and procuring evidence and judgments shall conform as near as may be to the courts having concurrent jurisdiction with this court. (1925, c. 167, s. 11.)

§ 7-343. **Appeals.**—Appeals in all actions may be taken from the court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only two copies shall be required; one for the court and the other for the opposing counsel. The time for taking and prosecuting appeals shall be counted from the end of the calendar month of the court at which such trial is had. It shall be the duty of any judge of the superior court holding the courts in any county, where a court is established under the provisions of this article, to allot sufficient and adequate time during each regular term of the superior court held in such county for the hearing of appeals from the county civil court of such county. Upon such appeal the superior court may either affirm or modify and affirm the judgment of the county civil court or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the Supreme Court, as is now provided by law. Orders to stay execution on judgments entered in the court shall be the same as in appeals from the superior court to the Supreme Court, and judgments of said court may be enforced by execution by the clerk thereof, returnable within twenty days, and transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and when docketed shall, in all respects, be judgments in the superior court in the same manner and to the same extent as if rendered by the superior court. (1925, c. 167, s. 12.)

§ 7-344. **Jurisdiction.**—The county civil court shall have jurisdiction only in civil matters, and as follows:

- (1) Jurisdiction concurrent with that of the justices of the peace of the county;
- (2) Jurisdiction concurrent with the superior court in all actions founded on contract wherein the amount demanded shall not exceed the sum of five thousand dollars (\$5,000), exclusive of interest and cost;
- (3) Jurisdiction concurrent with the superior court in all actions not founded upon contract; wherein the amount demanded shall not exceed the sum of five thousand dollars (\$5,000), exclusive of interest and cost;
- (4) Jurisdiction concurrent with the superior court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;
- (5) Jurisdiction concurrent with the superior court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions. (1925, c. 167, s. 13.)

§ 7-345. **Stenographer; fees.**—There shall be an official stenographer of the court whose duties and fees shall be the same and taxed as those of the official stenographer of the superior court. (1925, c. 167, s. 14.)

§ 7-346. **Disqualification of judge.**—Where the judge is disqualified to try any case, it shall be removed for trial to the superior court of the county, in which the court is located or ore tenus to the substitute judge. (1925, c. 167, s. 15.)

§ 7-347. **Pending cases, transfer.**—By consent of plaintiff and defendant any case, within the jurisdiction of the court, pending in the superior court may be transferred to the docket of the county civil court, and there tried. (1925, c. 167, s. 16.)

§ 7-348. **Abolishing court.**—This court may be abolished by resolution of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and, in case of the abolition of the court, cases then pending shall be transferred to the superior court. (1925, c. 167, s. 17.)

§ 7-349. **Existing laws not repealed.**—This article shall not be construed to repeal any existing laws by which a county court may be created or to effect or repeal any court now or hereafter created under existing laws and shall only be construed to be an additional method by which a county court may be established. (1925, c. 167, s. 18.)

§ 7-350. **Article inapplicable to certain counties.**—This article shall not apply to the counties of Bertie, Bladen, Caldwell, Columbus, Craven, Gaston, Henderson, Jones, Mitchell and Vance. (1925, c. 167, s. 19.)

ARTICLE 35.

With Jurisdiction Not to Exceed \$1500.

§ 7-351. **Establishment.**—In addition to the plans now provided by law for the establishment of courts inferior to the superior court, there may be established by resolution of a majority of the members of the board of county commissioners of any county in the State a court of civil jurisdiction, which shall be a court of record, shall be called County Civil Court and shall have civil jurisdiction as provided in this article. (1937, c. 437, s. 1.)

Local Modification.—Caswell, Wayne:
1937, c. 437, s. 30.

§ 7-352. **Qualification of judge.**—The county civil court shall be presided over by a judge, who may be an attorney at law, who shall at the time of appointment and qualification be an elector in and for said county, and he shall not by reason of his term of office be prohibited from practicing the profession of attorney at law in other courts except as to matters pending in connection with or growing out of said county civil court. (1937, c. 437, s. 2.)

§ 7-353. **Appointment of judge; vacancies; substitute judge.**—After the ratification of this article and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor of the State, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the Governor of the State to appoint the judge of each such county civil court, who shall preside over said court; the said judge shall hold office for a term of two years and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the Governor of the State.

When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification or other cause, the Governor of the State shall appoint some other person, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge. At the time of fixing the salary for the judge, the board of county commissioners shall fix a per diem compensation for the substitute judge which shall be paid out of the salary fixed for the judge. (1937, c. 437, s. 3.)

§ 7-354. **Oath of judge.**—Before entering upon the duties of his office, the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the superior court, and file the same with the clerk of the superior court of said county; and said clerk shall record the same. (1937, c. 437, s. 4.)

Cross References.—As to forms of oaths 11-6, 11-7, 11-11. And see Const., Art. VI, required of superior court judges, see §§ § 7.

§ 7-355. **Salary of judge.**—The salary of said judge shall be fixed by the board of commissioners of the county, shall not be decreased during the term of office, and shall be paid in monthly installments out of the funds of the county.

The judge shall be provided by the county board of commissioners with a suitable and convenient room for holding court at the county seat. (1937, c. 437, s. 5.)

§ 7-356. **Disqualification of judge.**—Where the judge is disqualified by reason of interest in any case, it shall be removed for trial to the superior court of the county. (1937, c. 437, s. 6.)

§ 7-357. **Clerk of court.**—The clerk of the superior court shall be ex-officio clerk of the county civil court established under the provisions of this article, and he shall have as nearly as possible the same duties, powers and responsibilities with reference to the county civil court as he has in his capacity as clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the county civil court to the same extent as he is bound as clerk of superior court. In addition to the salary or fees paid him as clerk of superior court, the clerk of the county civil court shall be paid such additional reasonable compensation as the board of county commissioners may fix; and the board of county commissioners are hereby authorized and empowered to provide the salary of such additional deputy or deputies as he may need. (1937, c. 437, s. 7.) *

§ 7-358. **Oath of clerks.**—The clerks of the county civil court, before entering on the duties of their office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of them under this article and file such oaths with the register of deeds for the county. (1937, c. 437, s. 8.)

Cross References.—As to forms of oaths §§ 11-6, 11-7, 11-11. And see Const., Art. required of clerk of the superior court, see VI, § 7.

§ 7-359. **Appointment and removal of deputies.**—Each clerk of the county civil court shall have the authority to appoint deputy clerks and the authority to revoke such appointments at will. He shall make a record of each appointment and furnish a transcript of such record to the register of deeds, who shall record the same in the record of deeds and make a cross-index thereof. When the appointment of any deputy clerk is revoked, the clerk shall write on the margin of the records of such appointment the word "revoked" and the date of revocation, and sign his name thereto. (1937, c. 437, s. 9.)

§ 7-360. **Oath and power of deputies.**—If any deputy clerk shall be appointed as provided in this article, he shall take and subscribe to the oaths prescribed for clerks. Each deputy clerk appointed as herein provided shall have as nearly as possible the same powers and duties, with reference to the county civil court, as a deputy clerk of the superior court has with reference to the superior court. (1937, c. 437, s. 10.)

§ 7-361. **Sheriff.**—The sheriff of the county, or his deputies appointed, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. The board of county commissioners of the county are authorized to make said sheriff such additional allowances as they may deem necessary and proper for such services, in addition to his salary or fees now fixed by law. (1937, c. 437, s. 11.)

§ 7-362. **Stenographer.**—The board of county commissioners shall appoint an official stenographer of the court, whose duties shall be the same as those of the official stenographer of the superior court, and the compensation shall be fixed and paid by the board of county commissioners. (1937, c. 437, s. 12.)

§ 7-363. **Jury trial.**—In the trial of actions in said court any party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. (1937, c. 437, s. 13.)

§ 7-364. **Waiver of jury trial; jurisdiction concurrent with superior court.**—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition the plaintiff, in writing, demands a jury trial; or, at the time of the filing of the answer or other pleading which raises an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. (1937, c. 437, s. 13(a).)

§ 7-365. **Waiver of jury trial; jurisdiction concurrent with justice of peace.**—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of summons the plaintiff or petitioner, in writing, demands a jury trial; or the defendant, at any time before the commencement of the trial, in writing, demands a jury trial. (1937, c. 437, s. 13(b).)

§ 7-366. **Jury trial in cases instituted in superior court or before magistrate.**—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court and removed to this court, a jury trial will be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial; in which event the number of the jury shall be as herein elsewhere provided. (1937, c. 437, s. 13(c).)

§ 7-367. **Jury of six; demand and deposit for jury of twelve.**—The jury of said court shall be a jury of six unless, at any time before the calling of the cause for trial, either party, who has not waived the right to trial by jury by failing to demand a jury trial in apt time as provided herein, or otherwise, demands a trial by a jury of twelve, in which event a jury of twelve shall be impaneled: Provided, that in those cases in which a jury of twelve is demanded the party shall, at the time of making the demand, pay to the clerk of said court a deposit of five dollars to insure the payment of the jury tax: Provided further, that where a party making such demand for a jury of twelve makes affidavit and satisfies the judge or clerk of said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for jury of twelve shall be returned to the party making it when the jury tax is paid by the losing party against whom the costs are taxed. (1937, c. 437, s. 13(d).)

§ 7-368. **Judge may impanel jury on own motion.**—The judge of said court, when in his opinion the ends of justice would be best served by submitting an issue or issues to the jury, may call a jury of his own motion and submit to it such issue or issues as he may deem material. (1937, c. 437, s. 13(e).)

§ 7-369. **Drawing juries; summons of jurors; pay of jurors.**—The regular jurors shall be drawn from the superior court jury box; the drawing and summoning of said jurors shall be in the same manner as jurors are drawn and summoned for the superior court: Provided, however, only twelve jurors shall be drawn and summoned for any one week of court unless the judge specifies that a larger number shall be drawn. The judge of each county civil court, at least thirty days in advance, shall notify the chairman of the board of county commissioners when a jury will be needed.

Jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, to be paid out of the treasury of said county on

presentation of a ticket duly issued by the clerk of said court. (1937, c. 437, s. 14.)

§ 7-370. **Talesmen.**—The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week or a portion thereof for the proper dispatch of the business of the court. (1937, c. 437, s. 15.)

§ 7-371. **When court opens; terms of court.**—The county civil courts shall be open for the transaction of business within their jurisdiction whenever matters before the court require attention, except for the trial of issues of fact requiring a jury and the trial of contested causes wherein the county civil court is exercising jurisdiction concurrent with that of the superior court, which shall be heard in term time.

The judge of the county civil court is hereby authorized to fix the terms of said court upon consulting with the clerk of the court and the members of the bar of the county. (1937, c. 437, s. 16.)

§ 7-372. **Jurisdiction.**—The county civil court shall have jurisdiction only in civil matters and as follows:

- (1) Jurisdiction concurrent with that of the justices of the peace of the county;
- (2) Jurisdiction concurrent with the superior court in all actions founded on contract wherein the amount demanded shall not exceed the sum of one thousand five hundred dollars, exclusive of interest and costs;
- (3) Jurisdiction concurrent with the superior court in all actions not founded on contract wherein the amount demanded shall not exceed the sum of one thousand five hundred dollars, exclusive of interest and costs;
- (4) Jurisdiction concurrent with the superior court in all actions to try title to lands, to prevent trespass thereon, and to restrain waste thereof wherein the value of the land does not exceed the sum of one thousand five hundred dollars;
- (5) Jurisdiction concurrent with the superior court in all actions and proceedings for divorce and alimony, or either, and to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper. (1937, c. 437, s. 17.)

§ 7-373. **Appeals from justice of the peace.**—In all cases where there is an appeal from a justice of the peace of a county wherein a county civil court has been established under the provisions of this article, such appeal shall be first heard de novo in the county civil court in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said county civil court. Said appeals shall be docketed in the county civil court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1937, c. 437, s. 18.)

§ 7-374. **Removal of cause before justice of peace.**—When, upon affidavit made before entering upon the trial of any cause before any justice of the peace of said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause shall be removed for trial to the said county civil court. (1937, c. 437, s. 19.)

§ 7-375. **Pending cases, transfer.**—By written consent of plaintiff and defendant filed with the clerk of superior court, any case within the jurisdiction of the county civil court, now or hereafter pending in the superior court, may be transferred to the docket of the county civil court and there tried; if a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise, the right to trial by jury shall be conclusively presumed to have been expressly waived. (1937, c. 437, s. 20.)

§ 7-376. **Records; blanks, forms, books, stationery.**—The clerk of the county civil court shall keep separate records for use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery and office equipment as may be needed by the court; the clerk shall keep the same in the office of the clerk of such court. (1937, c. 437, s. 21.)

§ 7-377. **Processes; pleadings; procedure, etc.**—When the county civil court is exercising jurisdiction concurrent with that of the superior court, the rules of processes, pleadings, procedure, practice, and procuring evidence and judgment shall conform as nearly as possible to those of the superior court.

When the county civil court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the county civil court by summons issued and signed by the clerk or deputy; and orders to seize property in claim and delivery proceedings, warrants of attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice, and procuring evidence and judgments shall conform as nearly as possible to those of the courts of the justices of the peace of the county. (1937, c. 437, s. 22.)

§ 7-378. **Appeal to superior court; time for perfecting appeal; record on appeal; briefs; judgments; appeal to Supreme Court.**—Appeals in actions may be taken from the county civil court within ten days from date of rendition of judgment to the superior court of the county in term time, for errors assigned in matters of law or legal inference, in the same manner as is provided for appeals from the superior court to the Supreme Court, except as follows:

(1) The appellant shall cause a copy of the statement of case on appeal to be served on the respondent within thirty days from the entry of the appeal taken, and the respondent, within fifteen days after such service, shall return the copy with his approval or specific amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

(2) The appellant shall file one typewritten copy of the statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the county civil court to the superior court as the complete record on appeal in said court.

(3) The record in the case on appeal to the superior court must be docketed in the superior court within ten days after the date of settling the case on appeal. If the appellant shall fail to perfect his appeal within the prescribed time, the appellee may file with the clerk of superior court a certificate of the clerk of court from which the appeal comes showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant and the date of the settling of case on appeal, if any has been settled, with his motion to docket and dismiss said appeal at appellant's cost, which motion shall be allowed at the first regular term or any succeeding regular term of the superior court.

(4) Appellant shall file one typewritten brief with the clerk of superior court, and shall immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If appellant's brief has not been filed with the clerk of superior court, and no copy has been delivered to appellee's counsel within three weeks from the date of settling the case on appeal, the appeal will be dismissed on motion of appellee at the next regular term or any succeeding regular term of the superior court, unless for good cause shown the court shall give appellant further time to file his brief.

(5) Appellee shall file one typewritten brief and a carbon copy thereof with the clerk of superior court within five weeks from the date of settling the case on appeal; the copy of same will be furnished counsel for appellant by the clerk of superior court, on application. On failure of the appellee to file his brief by the time required, the case will be heard and determined at the next regular term or any succeeding regular term of the superior court without argument from appellee, unless for good cause shown the court shall give appellee further time to file his brief.

(6) It shall be the duty of any judge of the superior court holding court in any county where a court is established under the provisions of this article, to allot sufficient and adequate time during each regular term of the superior court held in such county for the hearing of appeals from the county civil court of such county: Provided, no such appeal shall be heard until five days have expired since the filing of appellee's brief or since the time appellee's brief should have been filed.

(7) Upon such appeal, the superior court may either affirm or modify the judgment of the county civil court or remand the cause for a new trial.

(8) From the judgment of the superior court an appeal may be taken to the Supreme Court as is now provided by law. (1937, c. 437, s. 23.)

§ 7-379. Stay of execution; enforcement of judgments, etc.—Orders to stay execution on judgments entered in the county civil court shall be the same as in appeals from the superior court to the Supreme Court.

Judgments of the county civil court shall be docketed in the judgment docket of the superior court as is provided for judgments of the superior court, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statute of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1937, c. 437, s. 24.)

§ 7-380. Court seal.—The county civil court shall have a seal with the impression "..... County Civil Court," which shall be used in attestation of all summons, other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the State of North Carolina. (1937, c. 437, s. 25.)

§ 7-381. Costs and fees.—There shall be taxed in the county civil court the same costs and fees for services of the officers thereof as provided for the court having concurrent jurisdiction; such costs and fees shall be taxed and collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1937, c. 437, s. 26.)

§ 7-382. Abolishing court.—This court may be abolished by resolution of a majority of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and in case of the abolition of the court, cases then pending shall be transferred to the superior court and there tried. (1937, c. 437, s. 27.)

§ 7-383. Existing laws not repealed.—This article shall not be construed to repeal or modify any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws, and shall only be construed to be an additional method by which a county court may be established. (1937, c. 437, s. 28.)

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

ARTICLE 36.

County Criminal Courts.

§ 7-384. **Counties authorized to establish county criminal courts.**—In each county in this State there may be established a court of criminal jurisdiction, which shall be a court of record, and it shall be maintained pursuant to the provisions of this article, and said court shall be called the county criminal court, and shall have jurisdiction over the entire county in which said court shall be established. (1931, c. 89, s. 1.)

§ 7-385. **Established by resolution of county commissioners.**—If, in the opinion of the board of commissioners of any county, the public interest will be best promoted by so doing, they may establish a county court under the provisions of this article, by resolution which shall in brief recite the reasons for the establishment thereof, and further recite that in the opinion of the board of commissioners it is not necessary that an election be called for the establishment of said court, as herein provided, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (1931, c. 89, s. 2.)

§ 7-386. **Court may be abolished by resolution.**—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of commissioners may, by proper resolution, reciting in brief the reasons therefore, abolish said court. (1931, c. 89, s. 3.)

§ 7-387. **Transfer of cases from docket of superior court.**—Upon the establishment of the county court, as in this article authorized, the clerk of the superior court shall immediately transfer from the superior court to such county court all criminal actions pending in the superior court of which the county court has jurisdiction, as in this article conferred, and the county court shall immediately proceed to try and dispose of such criminal actions. (1931, c. 89, s. 4.)

§ 7-388. **Appointment of judge; associate judge.**—The court shall be presided over by a judge, who may be licensed to practice law, and who, at the time of his election or appointment, shall be a qualified elector in the county. The board of commissioners of the county shall appoint such judge, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided. In the event of a vacancy by death or resignation, appointment shall be for the unexpired term of the previous judge. The salary of said judge shall be fixed by the board of commissioners of the county, and the same shall be paid monthly out of the general county fund. In each county in which the court is established, under the provisions of this article, there shall be appointed by the board of commissioners of said county an associate judge, who shall preside as judge of the county court, and with like authority of the regular judge, in the event of sickness or absence from the county of the regular judge, or in the event that the regular judge should be disqualified by relationship to the parties in interest, or from other cause. The associate judge shall take the same oath of office required by the judge of the county court, and shall be paid such compensation for his services as may be provided by the board of commissioners. The compensation which shall be paid to the associate judge shall be deducted from the salary to be paid to the regular county judge as herein provided. He shall be appointed at the time fixed for the appointment of the judge of the county court, and for the same term as herein provided for a regular judge of the county, with the authority

on the part of the board of commissioners to fill the vacancy in the event of death or resignation. (1931, c. 89, s. 5.)

§ 7-389. Appointment of prosecuting attorney.—There shall be a prosecuting attorney of said county court, to be known as the prosecuting attorney, who shall appear for the State and prosecute all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of commissioners, to be paid monthly from the general county fund. The board of commissioners shall appoint such prosecuting attorney, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided, except in the event of a vacancy in the office of prosecuting attorney, either by death or resignation, the appointment to fill such vacancy shall be for the unexpired term of the previous prosecuting attorney. (1931, c. 89, s. 6.)

§ 7-390. Clerk of court; term of office; fees; bond; sheriff.—In those counties in which the clerk of the superior court and sheriff are paid fees and not salaries, such clerks and sheriffs shall receive the same fees for services rendered in a county court as they would have received had such services been rendered in the superior court.

The clerk of the superior court shall, ex officio, be clerk of the county court, and in all counties in which the clerk of the superior court is paid fees, the clerk of the superior court shall have the right and privilege to resign as clerk of the county court, and in the event of such resignation the board of commissioners shall have the authority to appoint a clerk of the county court, whose term of office shall be two (2) years, and whose term of office shall expire at the time fixed for the termination of the office of the judge of said court, and the appointment of the clerk of the county court shall thereafter be made by the board of commissioners at the same time when the appointment of the judge of said court is made by said board of commissioners. He will receive the same fees for services rendered as clerks of the superior courts. In all counties in which the clerks of the superior court are paid salaries the board of commissioners are authorized, in their discretion, to provide additional compensation to such clerks for their services rendered as clerk of the county court.

In the event that the clerk of the superior court shall resign as clerk of the county court as herein provided, upon the appointment of a clerk to the county court, he shall be required to enter into a bond in such sum as may be fixed by the board of commissioners for the faithful performance of the duties of his office. (1931, c. 89, s. 7.)

Local Modification.—Lee: 1941, c. 330.

§ 7-391. Oath of judge; prosecuting attorney.—The judge of the county court, before entering upon the duties of his office, shall take the prescribed oath required of judges of the superior court, and such oath shall be recorded by the clerk of the superior court of the county. The prosecuting attorney, before entering upon the duties of his office, shall take the prescribed oath required of solicitors of the superior court, and said oath shall be recorded by the clerk of the superior court of the county. (1931, c. 89, s. 8.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11. And see Const., Art. VI, § 7.

§ 7-392. Court seal.—The county criminal court shall have a seal with the impression "County Court of County," which shall be used in attestation of all writs, warrants, or other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the State of North Carolina. (1931, c. 89, s. 9.)

§ 7-393. Jurisdiction; appeal; judgment docket.—The jurisdiction of the county court shall be as follows:

(a) Said court shall have final exclusive and original jurisdiction of all criminal offenses committed in the county below the grade of a felony, as now defined by law, except as to offenses over which justices of the peace have final jurisdiction, and all such offenses whereof said court is given jurisdiction are hereby declared to be petty misdemeanors.

(b) To punish for contempt to the same extent and in the same manner allowed by law to the superior court of this State; to issue writs ad testificandum and other processes to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this State.

(c) The judge of the county court shall have all the power and jurisdiction and authority now conferred by law upon the superior court to sentence any person who pleads guilty or who is convicted in said court of a misdemeanor for which the punishment prescribed by law is imprisonment, to be imprisoned in the common jail of the county and to be assigned to work on the public roads under the supervision of the State Highway and Public Works Commission and the clerk of said court shall issue commitments therefor in the same manner as now provided by law for the clerks of the superior court.

(d) Any person convicted in said court shall have the right of appeal to the superior court of said county, and upon such appeal the trial in the superior court shall be de novo.

(e) The county court shall have exclusive preliminary jurisdiction over all offenses whereof exclusive jurisdiction is not given to said court, and shall hear and determine all warrants charging such offenses, and in the event that the court finds probable cause, shall bind the defendant over to the superior court, requiring such bond as the court may fix for the appearance of the defendant at the next ensuing term of the superior court of said county for the trial of criminal causes; and all justices of the peace issuing warrants wherein the defendant or defendants are charged with the commission of an offense whereof the superior court has jurisdiction, shall make said warrants returnable before the said county court.

(f) The judge of the county court shall have the same authority as the judge of the superior court to render judgments upon all appearance bonds, and such other bonds as are authorized by law, when default has been made. All such judgments shall be certified to and docketed upon the civil judgment docket in the superior court of the county in which the court is held, and shall be cross-indexed as other judgments, and shall, from the time of docketing, have the same force and effect as judgments of the superior court. (1931, c. 89, s. 10; 1931, c. 241; 1937, c. 123.)

Local Modification.—Burke: 1935, c. 298; 1939, c. 226.

Cross Reference.—For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal ac-

tions, see § 7-64.

Editor's Note.—Public Laws 1937, c. 123, repealed Public Laws 1931, c. 241, relative to civil jurisdiction of recorder's court in Gates County.

§ 7-394. Jury trials.—In all cases coming before the said county court a jury may be demanded by either the State or the defendant, or the court may, upon its own motion, order a jury trial in any case where, in the judgment of the court, the ends of justice would be better met by submitting the case to a jury. The board of commissioners of the county in which said county court is established are hereby required to furnish the clerk of said county court with a list of jurors of said county, and in any case where a jury trial is to be had a jury of twelve (12) shall be drawn from the said list of jurors so furnished by the board of commissioners. The names of the jurors shall be drawn from the box as now provided in cases in the superior court in drawing a special venire: Provided, however, the defendant may waive a jury drawn from the box, in which event the court

shall direct the sheriff to summons bystanders or tales jurors to serve as jurors in said cases, and the judge of the county court shall have like authority as is now existing by the judge of the superior court to order the summons of tales jurors to serve in said court where the jurors drawn from the box shall be legally challenged or shall be otherwise disqualified to serve as such jurors. The causes of challenges of jurors in the county court shall be the same as now provided for challenges of jurors in the superior court. The fees of jurors shall be the same as now paid jurors in the superior court, and shall be paid from the general county fund, and a jury tax of fifteen (\$15.00) dollars in such cases shall be taxed in the bill of costs. (1931, c. 89, s. 11.)

Local Modification.—Anson: 1949, c. 773; Burke: 1951, c. 689; Lee: 1939, c. 213; Onslow: 1941, c. 303.

§ 7-395. Process.—The clerks of the superior court as ex-officio clerks and/or the clerks of county criminal courts or any of their deputies, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants, peace warrants, subpoenas, and/or other processes of law in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases, and shall be directed to the sheriff or other lawful officer of the county, and the service thereof shall be lawfully made when made by the sheriff or deputy sheriff of the county, or any constable of said county, or by any rural policeman or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of the superior court as ex officio clerk or the clerk of such court, when attested by the seal of said court, shall run anywhere in the State of North Carolina, and shall be executed by all officers in the same manner and way as processes now issued by the superior court. (1931, c. 89, s. 12; 1947, c. 130.)

Editor's Note.—The 1947 amendment rewrote this section.

§ 7-396. Duties of judge; bond on appeal or on being bound over.—The judge of the county court shall preside over said court and shall direct and determine all actions coming before him, the jurisdiction of which is conferred by this article, and in all cases where the defendant or defendants shall crave an appeal to the superior court, and in cases where the court has preliminary jurisdiction, and probable cause is found, the defendant shall be required to give bond, with sufficient surety, to be fixed by the court, conditioned upon the defendant's appearance at the next ensuing term of the superior court of said county for the trial of criminal causes, and in default thereof the court shall commit the defendant to the common jail of said county until said defendant shall have given bond or shall have been otherwise discharged according to law, except in capital cases, when the court shall find probable cause, he shall bind the defendant over to the superior court without bond. (1931, c. 89, s. 13.)

§ 7-397. When prosecuting attorney's fee taxed in bill of costs.—In all cases where the defendant shall plead guilty, or shall be convicted, there shall be taxed in the bill of costs a fee of eight dollars (\$8.00) in lieu of prosecuting attorney's fee, which shall be paid by the defendant, and shall be paid into the general county fund. In the event the defendant is confined to jail or confined to jail and assigned to work on the public roads such fee shall not be taxed as a part of the cost. (1931, c. 89, s. 14.)

§ 7-398. Complete record to be kept by clerk; docket.—It shall be the duty of the clerk of said court to keep an accurate account and true record of all costs, fines, penalties, forfeitures, and punishments of said court imposed under the provisions of this article, and said record shall show the name of each offender, the name of the offense, the date of the hearing of the trial, and the punishment

imposed, and the board of commissioners shall provide dockets for recording all of the processes issued by said court, which shall conform to the docket kept by the clerk of the superior court, and shall also provide proper files to properly keep a record of all cases which shall be disposed of in said court, and the disposition that has been made of the same. (1931, c. 89, s. 15.)

§ 7-399. Warrants returnable to court.—All warrants for crimes whereof the county court shall have jurisdiction may be issued by any justice of the peace of said county, or mayor of any incorporated town, as provided by law, and shall be made returnable before the county court at the next ensuing term thereof. (1931, c. 89, s. 16.)

§ 7-400. Service fees to officers except where they are on salary.—The cost of issuing and serving warrants, subpoenas, and other processes of law by said court shall be payable to the officers issuing or serving them, and shall be payable to the clerk of said court as is now done in cases determined by the superior court, except in those counties where officials are paid salaries and are not allowed fees, in which cases the costs so taxed shall be paid into the office of the clerk of said court, to be paid by him to the county treasurer or depository of said county, in the same manner and way as is now provided for similar fees in the superior court. (1931, c. 89, s. 17.)

§ 7-401. Regular and special terms; place of sessions.—There shall be held a regular term of the county court established under the provisions of this article on the second Tuesday in each month: Provided, however, special terms may be held at any time by order of the judge of said court for the purpose of disposing of cases where pleas of guilty shall be entered and for the trial of cases where the defendants are confined to prison. At all regular terms the court shall continue in session until all cases are tried, continued, or otherwise disposed of according to law: Provided, however, the board of county commissioners in any county in which a county court is established under the provisions of this article by proper resolution duly entered upon the minutes of said board, may, in the exercise of their discretion, fix other days than the days provided in this article on which regular terms of said court may be held: Provided, further, when a regular term of the county court to be held under the terms fixed by this article shall conflict with a term of the superior court in said county, the regular term of the county court shall be held on the first Tuesday following the termination of said term of the superior court, as fixed by law. All sessions of said county court shall be held in the courthouse of the county in which said court is established. (1931, c. 89, s. 18.)

§ 7-402. Judge and prosecuting attorney may practice law in other courts.—In the event of the appointment of a licensed lawyer as judge or prosecuting attorney of said county court, nothing in this article shall prevent the said judge or the prosecuting attorney appointed under the provisions of this article from practicing law in matters in which he is in no way connected by reason of his said office, or in courts in the State in matters which have not been heard or will not be heard in the county court of which he is an officer. (1931, c. 89, s. 19.)

§ 7-403. Other county court acts not affected.—Nothing in this article shall be construed to repeal, alter, or amend any law heretofore enacted authorizing the establishment of county courts in the several counties of the State, but this article shall be construed to be in addition to and supplemental to such acts, and any court established under the provisions of this article shall be restricted and limited to all the provisions herein contained. (1931, c. 89, s. 20.)

§ 7-404. Certain counties excepted from provisions of article.—This article shall not apply to the counties of Alexander, Alleghany, Ashe, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Caswell, Catawba, Chowan, Clay,

Cleveland, Craven, Cumberland, Currituck, Dare, Davidson, Duplin, Durham, Edgecombe, Franklin, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Lincoln, Macon, Madison, Montgomery, New Hanover, Northampton, Orange, Pamlico, Pasquotank, Perquimans, Pitt, Randolph, Richmond, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Surry, Swain, Transylvania, Vance, Wake, Warren, Watauga, Wayne, Wilkes and Yancey. (1931, c. 89, s. 21; 1931, c. 270; 1935, c. 8; 1939, c. 41; 1951, c. 699.)

Editor's Note.—The 1935 amendment the 1939 amendment deleted Yadkin, and deleted Cabarrus from the list of counties, the 1951 amendment struck out Davie.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

ARTICLE 37.

Special County Courts.

§ 7-405. Establishment upon resolution of county commissioners.—In addition to the plans now provided for the establishment of courts inferior to the superior court, there may be established by resolution of all of the members of the board of county commissioners of any county in the State a court of criminal and civil jurisdiction, which shall be a court of record and shall be called a special county court and shall have criminal and civil jurisdiction as herein provided: Provided, that the board of county commissioners may by proper resolution, establish a special county court having only criminal jurisdiction or only civil jurisdiction or having both criminal and civil jurisdiction as herein provided. (1939, c. 357, s. 1.)

Cited in *State v. Carpenter*, 231 N. C. 229, 56 S. E. (2d) 713 (1949).

§ 7-406. Qualifications of judge and solicitor.—The judge of said court shall be an elector in and for said county at the time of appointment and qualification, and shall be a man of good moral character. The solicitor of the county shall be an elector in and for said county, shall be a man of good moral character and a licensed attorney at law. (1939, c. 357, s. 2.)

§ 7-407. Appointment of judge.—After the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor of the State, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the Governor of the State to appoint the judge of each such county court who shall preside over said court, and the said judge shall hold office for a term of two years, and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the Governor of the State. (1939, c. 357, s. 3.)

§ 7-408. Appointment of prosecuting attorney and clerk.—The board of commissioners of any county availing itself of the provisions of this article may elect or appoint and for the same term as herein provided for the appointment of the judge of this court, a prosecuting attorney and clerk for said court. (1939, c. 357, s. 4.)

Local Modification.—Richmond: 1941, c. 60, s. 4; 1943, c. 254, s. 4.

§ 7-409. Appointment of acting attorney or judge in absence of regular official.—Whenever, for any reason, the prosecuting attorney is temporarily absent, the judge shall appoint some other practicing attorney in the county to act as prosecuting attorney, and in case of temporary absence of the judge, either on account of sickness or other cause, the judge of said court shall

appoint a judge to hold court during the absence of the regular judge. (1939, c. 357, s. 5.)

§ 7-410. **Compensation of judge and solicitor.**—The salary of the judge and solicitor and clerk shall be fixed by the board of commissioners of the county, and shall be paid monthly out of the funds of the county. (1939, c. 357, s. 6.)

Local Modification.—Richmond: 1941, c. 60, s. 5.

§ 7-411. **Oaths of judge and solicitor.**—Before entering upon the duties of office, the judge and solicitor shall take and subscribe an oath as is now provided by law for the judges and solicitors of the superior court, and file the same with the clerk of the superior court of the county, and the clerk shall record the same. (1939, c. 357, s. 7.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11. And see Const., Art. VI, § 7.

§ 7-412. **Appointment of temporary judge, etc.**—Where the judge is disqualified by reason of interest in any case, he may appoint a temporary judge to hear said case, or said case may be removed to the superior court for trial in the county. (1939, c. 357, s. 8.)

§ 7-413. **Duties and liabilities of clerk.**—The clerk of the special county court established under the provisions of this article shall have as nearly as possible the same duties, powers, and responsibilities with reference to the special county court as a clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the special county court to the same extent as a clerk of the superior court. (1939, c. 357, s. 9.)

§ 7-414. **Oath of office of clerk.**—The clerk of the special county court before entering on the duties of the office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article and file such oath with the register of deeds for the county. (1939, c. 357, s. 10.)

Cross References.—As to forms of oaths, see §§ 11-6, 11-7, 11-11. And see Const., Art. VI, § 7.

§ 7-415. **Attendance upon court by sheriff or deputies.**—The sheriff of the county, or his deputies, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. (1939, c. 357, s. 11.)

§ 7-416. **Appointment of court stenographer.**—In the trial of any case in the special county court where a stenographer is deemed necessary, the judge of said court shall appoint a stenographer, and the fees for such work shall be taxed as part of the court cost in said case. (1939, c. 357, s. 12.)

§ 7-417. **Right of jury trial in civil actions.**—In the trial of civil actions in said court, any party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. (1939, c. 357, s. 13.)

§ 7-418. **Jury trial where no written pleadings are filed.**—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of the summons, the plaintiff, or petitioner, in writing, demands a

jury trial, or the defendant at any time before the commencement of the trial, in writing, demands a jury trial. (1939, c. 357, s. 14.)

§ 7-419. Jury trial where written pleadings are filed.—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition, the plaintiff, in writing, demands a jury trial, or unless at the time of the filing of the answer, or other pleading raising an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. (1939, c. 357, s. 15.)

§ 7-420. Jury trial where cases appealed or removed.—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court, and removed to this court, a jury trial shall be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial, in which event the number of the jury shall be as herein elsewhere provided. (1939, c. 357, s. 16.)

§ 7-421. Number of jurors; deposit on demand for jury trial.—The jury of said court shall be a jury of six in all civil cases where a jury is demanded: Provided, that in those cases in which a jury is demanded the party shall at the time of making the demand pay to the clerk of the said court a deposit of six dollars (\$6.00) to insure the payment of the jury tax: Provided, further, that where a party making such demand for a jury trial makes affidavit and satisfies the judge or clerk of the said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for a jury shall be returned to the party making it when the cost is paid by the losing party, against whom the cost is taxed. (1939, c. 357, s. 17.)

§ 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.—When a trial by jury is demanded in civil or criminal cases, the judge shall continue the cause until a day to be set, and the judge, together with the attorneys representing all parties shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of twelve, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. Such jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, and are to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court. (1939, c. 357, s. 18.)

§ 7-423. Jury trials in criminal actions.—In all criminal actions, upon demand of the defendant or the prosecuting attorney, a jury of six shall be summoned in the same manner as provided for summoning jurors in civil actions. (1939, c. 357, s. 19.)

§ 7-424. Talesmen may serve as jurors.—In all criminal and civil actions, the judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to call in a sufficient number of talesmen to serve during any one week or part of a week for the proper dispatch of the business of the court. (1939, c. 357, s. 20.)

§ 7-425. Sessions of court.—The special county court shall be open for the trial of all criminal cases of which it has jurisdiction at least one day of each week, and shall also be open at least once each month for the trial of all civil causes of which it has jurisdiction, said days to be fixed by the board of county commis-

sioners, and shall continue its session from day to day until all business is transacted by trial, continuance or otherwise. The session of the court shall be held in the county court house or other place within the county provided by the board of county commissioners for that purpose. Special sessions of the court may be called by the judge as the necessities may require. (1939, c. 357, s. 21.)

§ 7-426. Civil jurisdiction of court.—The special county court shall have jurisdiction in civil matters as follows:

1. Jurisdiction concurrent with that of the justices of the peace of the county.
2. Jurisdiction concurrent with the superior court in all actions founded on contracts wherein the amount demanded shall not exceed the sum of fifteen hundred dollars (\$1500.00), exclusive of interest and cost.
3. Jurisdiction concurrent with that of the superior court in all actions not founded on contracts wherein the amount demanded shall not exceed the sum of one thousand dollars (\$1000.00), exclusive of interest and cost.
4. Jurisdiction concurrent with the superior court in all attachment and claim and delivery proceedings wherein the value of the property demanded does not exceed the sum of one thousand dollars (\$1000.00), exclusive of interest and cost. (1939, c. 357, s. 22.)

§ 7-427. Procedure for hearing of appeals from courts of justices of the peace.—In all cases where there is an appeal from a justice of the peace of a county wherein a special county court has been established under the provisions of this article, such appeal shall be first heard de novo in the special county court. All appeals from justices of the peace in civil cases shall be heard in the same manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said special county court, and said appeals shall be docketed in the special county court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1939, c. 357, s. 23.)

§ 7-428. Transfer of cases from superior court.—By written consent of a plaintiff and defendant filed with the clerk of the superior court, any civil case within the jurisdiction of the special county court, now or hereafter pending, in the superior court, may be transferred to the docket of the special county court, and there tried. If a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise the right to trial by jury shall be conclusively presumed to have been expressly waived. (1939, c. 357, s. 24.)

§ 7-429. Separate records, equipment, etc., furnished by commissioners.—The clerk of the special county court shall keep separate records for use of said court to be furnished by the county commissioners, and they shall also provide necessary blanks, forms, books and such stationery and office equipment as may be needed by the court. The clerk shall keep the same in the office of the clerk of such court. (1939, c. 357, s. 25.)

§ 7-430. Procedure in civil actions.—In civil cases when the special county court is exercising jurisdiction concurrent with that of the superior court, as now established, the rules of procedure, pleadings, practice, and admission of evidence, and judgment shall conform as nearly as possible to those of the superior court. In civil cases where the special county court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the special county court by summons issued and signed by the clerk or deputy, and orders to seize property in claim and delivery proceedings, warrants of attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice and procuring evidence and judgments shall conform as nearly as possible to those of the courts of the justices of the peace. (1939, c. 357, s. 26.)

§ 7-431. **Orders to stay execution; judgments.**—Orders to stay execution on judgments entered in the special county court shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the county court shall be docketed in the judgment docket of the superior court, as is provided for judgments of the superior court, and the judgments when docketed shall in all respects be judgments of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statute of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1939, c. 357, s. 27.)

§ 7-432. **Seal of court.**—The county court shall have a seal with the impression “..... County Special Court”, which shall be used in attestation of all summons, other processes, etc., acts, or judgments of said court whenever required, and in the same manner and to the same effect as the seal of other courts of record in the State of North Carolina. (1939, c. 357, s. 28.)

§ 7-433. **Costs and fees.**—There shall be taxed in the special county court the same costs and fees for services of the officers thereof as provided for the court having concurrent jurisdiction; such costs and fees shall be taxed and collected by the clerk and paid over to the proper officers who are entitled to receive them. (1939, c. 357, s. 29.)

Local Modification.—Richmond: 1941, c. 60, s. 5½.

§ 7-434. **Reopening of cases and modification of judgments.**—When any case has been finally disposed of by the judge of the court and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the judge after the adjournment of the regular weekly term of court or after the adjournment of any special term of court. (1939, c. 357, s. 30.)

§ 7-435. **Criminal jurisdiction.**—The court shall have concurrent jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special county court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendment of the constitution in reference thereto, then the special county court, as herein established, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1939, c. 357, s. 31.)

Local Modification.—Richmond 1943, c. 254, s. 5. sive original jurisdiction in criminal actions. see § 7-64.

Cross Reference.—For statute divesting inferior courts in most counties of exclu- **Stated** in *State v. Carpenter*, 231 N. C. 229, 56 S. E. (2d) 713 (1949).

§ 7-436. **Judges vested with jurisdiction of municipal recorders.**—The judges of special county courts herein provided for shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specially in this section set forth, in so far as such jurisdiction and authority are applicable to such courts, and the provisions of existing law relative to municipal recorder's courts shall in all things apply to the special county courts where the

same are not inconsistent and in so far as same are practically applicable: Provided, that this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court. (1939, c. 357, s. 32.)

§ 7-437. Removal of cases from courts of justices of peace.—When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the special county court of the county. (1939, c. 357, s. 33.)

§ 7-438. Criminal cases bound over by justices of the peace.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the special county court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the special county court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the special county court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the special county court, and the case shall then stand for trial at the next succeeding term of said special county court, as if the defendant had been bound over to the said court in the first instance: Provided, further, that in the event any justice of the peace or other committing magistrate shall bind over to the special county court any person charged with an offense beyond the jurisdiction of said court, the said judge shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1939, c. 357, s. 34.)

§ 7-439. Notice to accused person and surety in cases transferred from superior court.—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a special county court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said special county court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the special county court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said special county court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the special county court, then the case shall not be tried without the consent of the accused person until the following term of the special county court. (1939, c. 357, s. 35.)

§ 7-440. Issuance of warrant in criminal causes.—All trials of criminal causes in said court shall be upon warrant issued by the clerk of said court or deputy clerk herein provided for or by the judge or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the judge shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1939, c. 357, s. 36.)

§ 7-441. **Punishment upon conviction.**—Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the judge may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads, under the supervision of the State Highway and Public Works Commission: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the judge may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the State. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as are allowed by law in similar cases before the superior court. (1939, c. 357, s. 37.)

§ 7-442. **Appeals to superior court.**—Any person convicted of any offense of which the county court has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the judge for any offense of which the court has not final jurisdiction shall, upon the judge's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1939, c. 357, s. 38.)

§ 7-443. **Fees for issuance and service of warrants.**—All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the special county court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1939, c. 357, s. 39.)

§ 7-444. **Costs and fees as county funds.**—There shall be taxed in the special county court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1939, c. 357, s. 40.)

§ 7-445. **Abolition of court by resolution of commissioners.**—Any court established under this article may be abolished by resolution of a majority of the board of county commissioners for such county by giving written notice of such intention one month prior thereto; and in case of the abolition of the court, cases then pending shall be transferred to the superior court and there tried. (1939, c. 357, s. 41.)

§ 7-446. **Counties exempt.**—This article shall not apply to the counties of Alamance, Alexander, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Burke, Caldwell, Carteret, Catawba, Chatham, Chowan, Clay, Cleveland, Columbus, Craven, Dare, Duplin, Edgecombe, Franklin, Forsyth, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, Madison, Mecklenburg, Mitchell, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Robeson, Rutherford, Sampson, Stanly, Surry, Union, Vance, Wake, Warren, Wayne, Washington and Wilson. (1939, c. 357, s. 42.)

§ 7-447. **Construction of article.**—This article shall not be construed to repeal or modify any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws, and shall

only be construed to be an additional method by which a special county court may be established for criminal, civil, or criminal and civil jurisdictions. (1939, c. 357, s. 43.)

SUBCHAPTER XI. JUDICIAL COUNCIL.

ARTICLE 38.

Judicial Council.

§ 7-448. **Establishment and membership.**—A Judicial Council is hereby created which shall consist of the Chief Justice of the Supreme Court or some other member of that court designated by him, two judges of the superior court designated by the Chief Justice, the Attorney General, and eight additional members, two of whom shall be appointed by the Governor, one by the President of the Senate, one by the speaker of the House of Representatives, and four by the council of the North Carolina State bar. All appointive members of the Judicial Council shall be selected on the basis of their interest in and competency for the study of law reform. The four members to be appointed by the council of the North Carolina State bar shall be active practitioners in the trial and appellate courts. (1949, c. 1052, s. 1.)

Editor's Note.—For a summary of article, see 27 N. C. Law Rev. 405.

§ 7-449. **Terms of office.**—Members of the Council shall hold office for the following terms:

1. If he designates no other member of the Supreme Court, the Chief Justice during his term of office.
2. The Attorney General during his term of office.
3. All other members for a term of two years. (1949, c. 1052, s. 2.)

§ 7-450. **Vacancy appointments.**—Vacancies shall be filled for the remainder of any term in the same manner as the original appointment. (1949, c. 1052, s. 3.)

§ 7-451. **Chairman of Council.**—The member from the Supreme Court shall serve as chairman of the Council. (1949, c. 1052, s. 4.)

§ 7-452. **Meetings.**—The Council shall meet at least once each quarter of the calendar year, or more often at the call of the chairman. (1949, c. 1052, s. 5.)

§ 7-453. **Duties of Council.**—It is the duty of the Judicial Council:

1. To make a continuing study of the administration of justice in this State, and the methods of administration of each and all of the courts of the State, whether of record or not of record.
2. To receive reports of criticisms and suggestions pertaining to the administration of justice in the State.
3. To recommend to the legislature, or the courts, such changes in the law or in the organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable. (1949, c. 1052, s. 6.)

§ 7-454. **Annual report; submission of recommendations.**—The Council shall annually file a report with the Governor. The Council shall submit any recommendations it may have for the improvement of the administration of justice to the Governor, who shall transmit the same to the General Assembly. (1949, c. 1052, s. 7.)

§ 7-455. **Compensation of members.** The members of the Council shall be paid the sum of seven dollars (\$7.00) per day and such necessary travel expenses and subsistence as may be incurred. (1949, c. 1052, s. 8.)

§ 7-456. **Executive secretary; stenographer or clerical assistant.**—The Council, by and with the advice, consent and approval of the Governor and Council of State, may employ an executive secretary who shall be a licensed attorney either full time or part time and fix his salary in an amount not to exceed three thousand dollars (\$3,000.00) per annum and also a stenographer or clerical assistant and fix her or his salary, said salaries to be paid out of the contingency and emergency fund. The executive secretary shall perform such duties as the Council may assign to him. (1949, c. 1052, s. 9.)

Chapter 8. Evidence.

Article 1.

Statutes.

- Sec.
8-1. Printed statutes and certified copies evidence.
8-2. Martin's collection of private acts.
8-3. Laws of other states or foreign countries.
8-4. Judicial notice of laws of United States, other states and foreign countries.
8-5. Town ordinances certified.

Article 2.

Grants, Deeds and Wills.

- 8-6. Copies certified by Secretary of State.
8-7. Certified copies of grants and abstracts.
8-8. Certified copies of grants and abstracts recorded.
8-9. Copies of grants certified by clerk of Secretary of State validated.
8-10. Copies of grants in Burke.
8-11. Copies of grants in Moore.
8-12. Copies of grants in Onslow.
8-13. Certain deeds dated before 1835 evidence of due execution.
8-14. Certified copies of maps of Cherokee lands.
8-15. Certified copies of certain surveys and maps obtained from the State of Tennessee.
8-16. Evidence of title under H. E. McCulloch grants.
8-17. Conveyances or certified copies evidence of title under McCulloch.
8-18. Certified copies of registered instruments evidence.
8-19. Common survey of contiguous tracts evidence.
8-20. Certified copies registered in another county and used in evidence.
8-21. Deeds and records thereof lost, presumed to be in due form.
8-22. Local: recitals in tax deeds in Haywood and Henderson.
8-23. Local: copies of records from Tyrrell.
8-24. Local: records of partition in Duplin.
8-25. Local: records of wills in Duplin.
8-26. Local: records of deeds and wills in Anson.
8-27. Local: records of wills in Brunswick.
8-28. Copies of wills.

Sec.

- 8-29. Copies of wills in Secretary of State's office.
8-30. Copies of wills recorded in wrong county.
8-31. Copy of will proved and lost before recorded.
8-32. Certified copies of deeds and wills from other states.
8-33. Copies of lost records in Bladen.

Article 3.

Public Records.

- 8-34. Copies of official writings.
8-35. Authenticated copies of public records.
8-36. Authenticated copy of record of administration.
8-37. Certificate of Commissioner of Motor Vehicles as to ownership of automobile.

Article 3A.

Findings, Records and Reports of Federal Officers and Employees.

- 8-37.1. Finding of presumed death.
8-37.2. Report or record that person missing, interned, captured, etc.
8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.

Article 4.

Other Writings in Evidence.

- 8-38. Proof by attesting witness not required.
8-39. Parol evidence to identify land described.
8-40. Proof of handwriting by comparison.
8-41. Bills of lading in evidence.
8-42. Book accounts under sixty dollars.
8-43. Book accounts proved by personal representative.
8-44. Copies of book accounts in evidence.
8-45. Itemized and verified accounts.

Article 4A.

Photographic Copies of Business and Public Records.

- 8-45.1. Photographic reproductions admissible; destruction of originals.
8-45.2. Uniformity of interpretation.
8-45.3. Photographic reproduction of records of Department of Revenue.
8-45.4. Title of article.

Article 5.**Life Tables.**

Sec.

8-46. Mortuary tables as evidence.

8-47. Present worth of annuities.

Article 6.**Calendars.**

8-48. Clark's calendar; proof of dates.

Article 7.**Competency of Witnesses.**

8-49. Witness not excluded by interest or crime.

8-50. Parties competent as witnesses.

8-50.1. Competency of evidence of blood tests.

8-51. A party to a transaction excluded, when the other party is dead.

8-52. Communications between attorney and client.

8-53. Communications between physician and patient.

8-54. Defendant in criminal action competent but not compellable to testify.

8-55. Testimony enforced in certain criminal investigations; immunity.

8-56. Husband and wife as witnesses in civil actions.

8-57. Husband and wife as witnesses in criminal actions.

8-58. Wife may testify in applications for peace warrants.

Article 8.**Attendance of Witness.**

8-59. Issue and service of subpoena.

8-60. Attendance before referee or commissioners.

8-61. Subpoena duces tecum issued.

8-62. Subpoenas and depositions upon removal of cause.

8-63. Witnesses attend until discharged; effect of nonattendance.

8-64. Witnesses exempt from civil arrest.

Article 9.**Attendance of Witnesses from without State.**

8-65. Definitions.

8-66. Summoning witness in this State to testify in another state.

Sec.

8-67. Witness from another state summoned to testify in this State.

8-68. Exemption from arrest and service of process.

8-69. Uniformity of interpretation.

8-70. Title of article.

Article 10.**Depositions.**

8-71. Manner of taking depositions in civil actions.

8-72. Notice required for taking depositions.

8-73. Publication of notice in case of non-resident.

8-74. Depositions for defendant in criminal actions.

8-75. Depositions in justices' courts.

8-76. Depositions before municipal authorities.

8-77. Depositions in quo warranto proceedings.

8-78. Commissioner may subpoena witness and punish for contempt.

8-79. Attendance before commissioner enforced.

8-80. Remedies against defaulting witness before commissioner.

8-81. Objection to deposition before trial.

8-82. Deposition not quashed after trial begun.

8-83. When deposition may be read on the trial.

8-84. Depositions taken in the State to be used in another state.

Article 11.**Perpetuation of Testimony.**

8-85. Relief afforded by superior courts.

8-86. How to obtain relief.

8-87. Rules of procedure; admissibility of testimony taken.

8-88. Taxing costs.

Article 12.**Inspection and Production of Writings.**

8-89. Inspection of writings.

8-90. Production of writings.

8-91. Admission of genuineness.

ARTICLE 1.*Statutes.*

§ 8-1. **Printed statutes and certified copies evidence.**—All statutes, or joint resolutions, passed by the General Assembly may be read in evidence from the printed statute book; or a copy of any act of the General Assembly certified

by the Secretary of State shall be received in evidence in every court. (1826, c. 7; R. C., c. 44, ss. 4, 5; Code, ss. 1339, 1340; Rev., ss. 1592, 1593; C. S., s. 1747.)

Public Statute Admissible.—Where the public printer has published a certain act with other public acts of the General Assembly, it is made, presumptively at least, a part of the public laws of the State and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352 (1896).

Private Statute Not Admissible.—The statute incorporating the North Carolina Railroad Company is a private act; and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence. *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891).

Same—Question of Law.—Whether the

statute, or some enactment in it, is public or private, is a question of law, which the court must determine, in the absence of statutory enactment declaring and settling its nature. *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891).

Journal of Legislature.—A copy of the journal of the legislature deposited with the Secretary of State is not evidence for any purpose. *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023 (1903), wherein the court said: "It is the journal, which we understand to be the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence."

§ 8-2. **Martin's collection of private acts.**—Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court. (1826, c. 7, s. 2; R. C., c. 44, s. 5; Code, s. 1340; Rev., s. 1593; C. S., s. 1748.)

§ 8-3. **Laws of other states or foreign countries.**—A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the Secretary of State of this State as having been copied from a printed volume of the laws of such state, territory or country, on file in the State or Supreme Court library, or in the offices of the Governor or Secretary of State. (1823, c. 1193, ss. 1, 3, P. R.; R. C., c. 44, s. 3; C. C. P., s. 360; Code, s. 1338; Rev., s. 1594; C. S., s. 1749.)

Editor's Note.—When any question arises as to the law of any other state or territory, or of the United States, or of any foreign country, the courts of this State are now required to take judicial notice thereof. See § 8-4 and note. Prior to the enactment of such section the rule was otherwise and such laws were required to be proved. *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362 (1898); *Miller v. Atlantic Coast Line R. Co.*, 154 N. C. 441; 70 S. E. 838 (1911); *Kelly Springfield Tire Co. v. Lester*, 192 N. C. 642, 135 S. E. 778 (1926). These cases and the others cited in this note were decided prior to § 8-4 and should be read with that fact in mind.

Instructions to Jury.—Where the for-

eign law has been proved it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case at hand, and its effect on the case, and it is error to refer the whole case to the jury without instructions. *Hooper v. Moore*, 50 N. C. 130 (1857).

Publication of Foreign Laws Admissible.—A book purporting to be the publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315 (1898).

Same—Printed Copy Admissible.—By the terms of this section, a printed copy

of the acts of the legislature of another state, is admissible in our courts to prove the statute law of such other state. Under the law as it stood prior to the enactment of this section, a printed copy of the acts of the legislature of a foreign state was not admissible in evidence. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220 (1894).

United States Agricultural Regulations Judicially Noticed.—The regulations of the United States Department of Agriculture concerning the transportation of cattle, are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. *State v. Railroad*, 141 N. C. 846, 54 S. E. 294 (1906).

Presumption as Regards Common Law.—In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those states whose jurisprudence is not founded on the common law. *Miller v. Atlantic, etc., R. Co.*, 154 N. C. 441, 70 S. E. 838 (1911). See also the luminous treatment of the subject generally in *Chamberlayne on Evidence*, vol. I, § 584 et seq.

Same—Question for Jury.—Where the common law of another state is proved, the court must leave the evidence of what

that law is to the jury and cannot inform them what the law is. *Moore v. Gwynn*, 27 N. C. 187 (1844).

Witnesses.—Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220 (1894).

The law of another state may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other state, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. *Howard v. Howard*, 200 N. C. 574, 158 S. E. 101 (1931).

A transcript of a statute duly certified by the Secretary of State is evidence at all times of its being in force according to its terms unless a repeal is shown. *State v. Cheek*, 35 N. C. 114 (1851).

The certificate of the Secretary of State, in relation to the statutes of another state, given in pursuance of this section is evidence in criminal and civil cases. *State v. Patterson*, 24 N. C. 346 (1842).

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

Cross Reference.—As to judicial notice of private statutes, see § 1-157.

Survival of Action under Law of Another State.—In an action to recover for the alleged tortious conversion of personality by a nonresident, instituted in this State after the death of the nonresident, against his personal representative, the failure of the complaint to allege that the cause of action survived under the laws of the state in which it arose does not render

the complaint demurrable. *Suskin v. Hodges*, 216 N. C. 333, 4 S. E. (2d) 891 (1939).

Applied in *Suskin v. Hodges*, 216 N. C. 333, 4 S. E. (2d) 891 (1939); *Charnock v. Taylor*, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126 (1943); *Lewis v. Furr*, 228 N. C. 89, 44 S. E. (2d) 604 (1947); *Caldwell v. Abernathy*, 231 N. C. 692, 58 S. E. (2d) 763 (1950); *Johnson v. Salisbury*, 232 N. C. 432, 61 S. E. (2d) 327 (1950).

§ 8-5. Town ordinances certified.—In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance. (1899, c. 277, s. 2; Rev., s. 1595; C. S., s. 1750.)

Cross References.—As to duty of mayor to certify ordinance on appeal, see § 160-16. As to how ordinances are pleaded and proved, see § 160-272.

When Certification Unnecessary.—The certification of a town ordinance as required by this section, is only prima facie

evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage. *State v. Razook*, 179 N. C. 708, 103 S. E. 67 (1920).

Evidence Insufficient to Rebut Prima

Facie Case.—When the defendant, convicted of the violation of a city ordinance, on appeal introduces in evidence the minutes of the meeting of the governing authorities of the town held on the date when the purported ordinance was alleged to have been adopted, which does not show its passage on that date, it is not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction. *State v. Gill*, 195 N. C.

425, 142 S. E. 328 (1928).

No Evidence of Certification or Publication.—The refusal to permit police officer to testify on cross-examination as to existence and contents of a paper-writing which purported to be an ordinance of the city, was not error where there was no evidence that purported ordinance had been certified, as required by this section, or that it had been printed and published by the city as provided in § 160-272. *Toler v. Savage*, 226 N. C. 208, 37 S. E. (2d) 435 (1946).

ARTICLE 2.

Grants, Deeds and Wills.

§ 8-6. **Copies certified by Secretary of State.**—Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the Secretary of State, certified by him as true copies, shall be as good evidence, in any court, as the original. (1822, c. 1154, P. R.; R. C., c. 44, s. 6; Code, s. 1341; Rev., s. 1596; C. S., s. 1751.)

In General.—This section does not make the copies better evidence than the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. *Richards v. Ritter Lumber Co.*, 158 N. C. 54, 73 S. E. 485 (1911).

Certification by Clerk of Secretary of

State.—See § 8-9.

Abstract Competent to Show Title.—Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the State. *Marshall v. Corbett*, 137 N. C. 555, 50 S. E. 210 (1905).

§ 8-7. **Certified copies of grants and abstracts.**—For the purpose of showing title from the State of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the Secretary of State, given in abstract or in full, and with or without the signature of the Governor and the great seal of the State appearing upon such record, shall be competent evidence in the courts of this State or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the State to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 1; C. S., s. 1752.)

Section Constitutional.—This section is constitutional and valid. *Howell v. Hurley*, 170 N. C. 401, 87 S. E. 107 (1915).

Copy Conclusive as to Regularity of Original.—An abstract of a grant of the State's land by the Secretary of State imports the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally

complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. *Howell v. Hurley*, 170 N. C. 401, 87 S. E. 107 (1915).

§ 8-8. **Certified copies of grants and abstracts recorded.**—Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the State of North Carolina

to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2; C. S., s. 1753.)

Cross Reference.—As to registration of certified copies of any deeds or writings, and their use in evidence, see § 47-31.

§ 8-9. Copies of grants certified by clerk of Secretary of State validated.—All copies of grants heretofore issued from the office of the Secretary of State, duly certified under the great seal of the State, and to which the name of the Secretary has been written or affixed by the clerk of the said Secretary of State, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this State when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the Secretary of State in person and duly registered. (1901, c. 613; Rev., s. 1597; C. S., s. 1754.)

Editor's Note.—Prior to the enactment of this section it was consistently held that the clerk of the Secretary of State had no power to certify and affix the great seal of the State to copies of grants and other

papers from the Secretary of State's office. *Beam v. Jennings*, 96 N. C. 82, 2 S. E. 245 (1887), but such acts on the part of the clerk are now validated by the provisions of this section.

§ 8-10. Copies of grants in Burke.—Copies of grants issued by the State within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (1901, c. 513; Rev., s. 1610; C. S., s. 1755.)

Cross Reference.—As to copies of destroyed record as evidence generally, see § 98-1 et seq.

§ 8-11. Copies of grants in Moore.—Copies of grants for land situated in Moore County and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the Secretary of State, shall have the force and effect of the originals and be evidence in all courts. (1903, c. 214; Rev., s. 1613; C. S., s. 1756.)

§ 8-12. Copies of grants in Onslow.—The copies of grants made by the register of deeds of Onslow County under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow County issued prior to the year one thousand eight hundred, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said chapter 434 of the laws of one thousand nine hundred and seven, shall be received as evidence in all courts of the State, and certified copies therefrom shall be received as evidence. (1907, c. 434; C. S., s. 1757.)

§ 8-13. Certain deeds dated before 1835 evidence of due execution.—In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the State of North Carolina are grantees and bearing date prior to the year one thousand eight hundred and thirty-five and purporting to have been filed and recorded in the office of the Secretary of State of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe,

nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the General Assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. (1915, c. 75; C. S., s. 1758.)

§ 8-14. Certified copies of maps of Cherokee lands.—Certified copies by the Secretary of State of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in chapter one hundred and seventy-five of the laws of one thousand nine hundred and eleven, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps. (1911, c. 175; C. S., s. 1759.)

§ 8-15. Certified copies of certain surveys and maps obtained from the State of Tennessee.—A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the State of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the Secretary of State under the provisions of chapter one hundred and sixty-two of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the Secretary of State, be competent evidence in the trial of any action in the courts of the State. (1913, c. 162; C. S., s. 1760.)

§ 8-16. Evidence of title under H. E. McCulloch grants.—In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (1819, c. 1021, P. R.; R. C., c. 44, s. 1; Code, s. 1336; Rev., s. 1600; C. S., s. 1761.)

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.—In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts numbers one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (1807, c. 724, P. R.; R. C., c. 44, s. 2; Code, s. 1337; Rev., s. 1601; C. S., s. 1762.)

§ 8-18. Certified copies of registered instruments evidence.—A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the State where the original of such copy would be admitted as evidence, although the party

offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68, s. 1; R. C., c. 37, s. 16; Code, s. 1251; 1893, c. 119, s. 2; Rev., s. 1598; C. S., s. 1763.)

Cross Reference.—As to recordation and use in evidence of certified copies generally, see § 47-31.

Editor's Note.—The provisions of this section permitting the reception of the copies herein mentioned as evidence, constitute a statutory exception to the rule of the best evidence. Under this rule it is well established that a party is required to introduce that kind of proof which affords the greatest certainty of the fact in question. In other words he will not be permitted to offer evidence of little weight when he is in possession of much better evidence. However this rule is not without its numerous exceptions, the foundation of which is that the primary object of all rules of evidence is to promote the administration of justice, and wherever general convenience requires it, the general rule will be bent or construed so as to meet the exigency.

The limitation placed on the exception contained in this section must be noted. The certified copies are admissible in evidence "unless by rule or order of the court, * * * such party shall have been previously required to produce the original * * *," in which case the general rule again becomes applicable and the original must be produced or its absence accounted for.

Certified Copy as Evidence.—The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued. *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887 (1902).

Copy of Registered Bond.—The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed has been made by the administrator of said obligor, is within the spirit and meaning of this section, and is admissible without accounting for the absence of the original. *Doe v. Shelton*, 46 N. C. 370 (1854).

Same—Official Bond.—Inasmuch as the duly certified copy of the record of any instrument required to be registered is admissible as full and sufficient evidence of such instrument, and as the register of deeds is required to register and keep the

bond of the superior court clerk, a duly certified copy of the record of such bond is competent evidence of its provisions. *State v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896).

Lack of Seal No Effect.—A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the State, is admissible in evidence, though the registry does not show the impress of the seal, or scroll to indicate it. And while the seal may be necessary to authenticate the grant, it will be presumed to have been affixed as required by law. *Aycock v. Raleigh, etc., Railroad*, 89 N. C. 321 (1883).

Signature of Clerk Essential.—The failure of the clerk to sign his name to the certificate for registration, a requirement found in the provisions of § 47-14, renders the instrument inadmissible as evidence under this section. *Woodliff v. Woodliff*, 192 N. C. 634, 135 S. E. 612 (1926).

Production of Original to Correct Mistakes.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302 (1911).

Parol Evidence to Explain Variance.—Where the original deed was lost, and it was contended that there was a material variance between the certified copy and the original deed, parol evidence to prove the correct description contained in the original instrument was rejected, this section being construed as to have no application to such a case. *Hooper v. Justice*, 111 N. C. 418, 16 S. E. 626 (1892).

Time and Manner of Objecting.—A party against whom the registry of a deed (or other instrument), or a copy thereof has been introduced in evidence, can not then raise the objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required the production of the original in the way provided by this section. *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902 (1891).

Issue of Tenancy in Common.—Where defendant in partition proceedings denies the allegations in the petition that petitioner is a tenant in common with defendants and seized of an undivided fee simple interest in the land, but does not plead sole seizin, petitioner is not required to prove title as in an action in ejectment, and petitioner's record evidence is held sufficient

to be submitted to the jury upon the sole issue of whether petitioner is a tenant in common with defendants in the land. *Tally v. Murchison*, 212 N. C. 205, 193 S. E. 148 (1937).

Cited in *Merchants, etc., Bank v. Sherrill*, 231 N. C. 731, 58 S. E. (2d) 741 (1950).

§ 8-19. Common survey of contiguous tracts evidence.—Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner. (1869-70, c. 34, ss. 1, 2; Code, s. 1277; Rev., s. 1505; C. S., s. 1764.)

When Possession of Part Equivalent to Whole.—Under the provisions of this section, by recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries, as if the whole territory had been covered by one tract, a possession at any one point on either of the separate tracts

will become equivalent to a possession of "the whole and every part." *McNamee v. Alexander*, 109 N. C. 242, 13 S. E. 777 (1891).

Sufficiency of Proof.—The surveyor's testimony that the map is correct is sufficient to make it competent. *Greenleaf v. Bartlett*, 146 N. C. 495, 60 S. E. 419 (1908).

§ 8-20. Certified copies registered in another county and used in evidence.—A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the State where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68; R. C., c. 37, s. 16; Code, s. 1253; 1893, c. 119, s. 3; Rev., s. 1599; C. S., s. 1765.)

Cross Reference.—As to variance between original and copy, see note of *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887

(1902), under § 8-18.

Cited in *Universal Finance Co. v. Clary*, 227 N. C. 247, 41 S. E. (2d) 760 (1947).

§ 8-21. Deeds and records thereof lost, presumed to be in due form.—Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate

at the time of conveyance, and that it was made upon sufficient consideration. (1854, c. 17; R. C., c. 44, s. 14; Code, s. 1348; Rev., s. 1602; C. S., s. 1766.)

Cross Reference.—As to burnt and lost records, see § 98-1 et seq. tration of a deed is presumed to be correct. *Cochran v. Linville Imp. Co.*, 127 N. C. 386, 37 S. E. 496 (1900).

Presumption of Regularity.—The regis-

§ 8-22. Local: recitals in tax deeds in Haywood and Henderson.—In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (R. C., c. 44, s. 11; Code, s. 1346; Rev., s. 1606; C. S., s. 1767.)

§ 8-23. Local: copies of records from Tyrrell.—Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the Superior Court of Tyrrell County as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington County, shall be treated in all respects as original records and received as evidence in all courts of Washington County. (1903, c. 199; Rev., s. 1612; C. S., s. 1768.)

§ 8-24. Local: records of partition in Duplin.—The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4; C. S., s. 1769.)

§ 8-25. Local: records of wills in Duplin.—The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the County Court of Duplin County, one thousand eight hundred and thirty, and entered in a book designated as Record of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2; C. S., s. 1770.)

§ 8-26. Local: records of deeds and wills in Anson.—The copies of the deeds and deed books and of the wills and will books made in Anson County under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books. (1905, c. 663, s. 3; Rev., s. 1615; C. S., s. 1771.)

§ 8-27. **Local: records of wills in Brunswick.**—Under the provisions of chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the Superior Court of Brunswick County, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the book of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s. 106; C. S., s. 1772.)

§ 8-28. **Copies of wills.**—Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (1784, c. 225, s. 6, P. R.; R. C., c. 119, s. 21; Code, s. 2175; Rev., s. 1603; C. S., s. 1773.)

Cross Reference.—As to probate of copy of lost will, see §§ 98-4, 98-5.

Certified Copy as Evidence.—Under this section a certified copy of a will is competent evidence in any case wherein the

contents of the will would be competent evidence. *Hampton v. Hardin*, 88 N. C. 592 (1883).

Copy of Will Made in Another State.—

See annotations under § 8-32.

§ 8-29. **Copies of wills in Secretary of State's office.**—Copies of wills filed or recorded in the office of the Secretary of State, attested by the Secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (1852, c. 172; R. C., c. 44, s. 12; 1856-7, c. 22; Code, s. 2181; Rev., s. 1607; C. S., s. 1774.)

§ 8-30. **Copies of wills recorded in wrong county.**—Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the State, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this State. (1858-9, c. 18; Code, s. 2182; Rev., s. 1608; C. S., s. 1775.)

§ 8-31. **Copy of will proved and lost before recorded.**—When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in chapter 98 entitled *Burnt and Lost Records*. (1866-7, c. 127; Code, s. 2183; Rev., s. 1609; C. S., s. 1776.)

§ 8-32. **Certified copies of deeds and wills from other states.**—In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this State, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died

or made the same) being properly certified, either according to the act of Congress or by the proper officer of the said state or territory, shall be read as evidence. (1802, c. 623, P. R.; R. C., c. 44, s. 9; Code, s. 1344; Rev., s. 1619; C. S., s. 1777.)

In General.—Records of other states, to be used in evidence in this State, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it have one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. *Hunter v. Kelly*, 92 N. C. 285 (1885); *Kinseley v. Rumbough*, 96 N. C. 193, 2 S. E. 174 (1887); *Riley v. Carter*, 158 N. C. 484, 74 S. E. 463 (1912).

Test for Admission under Section.—The copy, to be admissible in evidence, must be of such a will as would be admitted to record in North Carolina; hence where a will was executed in Tennessee and from the certificate of probate on the exemplified copy produced here, it appears that but one witness swore that he subscribed the will as witness in the presence of the testator and other witness to the will did not appear to have been sworn at all, it

was held that such a will should not be read in evidence. *Blount v. Patton*, 9 N. C. 237 (1822).

Properly Authenticated Copy Admissible.—A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will to authorize its reception as evidence in our courts. *Knight v. Wall*, 19 N. C. 125 (1836).

Incomplete Authentication.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. *Hunter v. Kelly*, 92 N. C. 285 (1885).

§ 8-33. **Copies of lost records in Bladen.**—The clerk of the Superior Court of Bladen County shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (1895, c. 415; 1903, c. 65; Rev., s. 1611; C. S., s. 1778.)

ARTICLE 3.

Public Records.

§ 8-34. **Copies of official writings.**—Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the Governor, Treasurer, Auditor, Secretary of State, Attorney General or Adjutant General, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county. (1792, c. 368, s. 11, P. R.; R. C., c. 44, s. 8; 1868-9, c. 20, s. 21; 1871-2, c. 91; Code, ss. 715, 1342; Rev., s. 1616; C. S., s. 1779.)

Copy Defined.—A copy, within the meaning of this section, is a transcript of the original—a writing exactly like another writing. *State v. Champion*, 116 N. C. 987, 21 S. E. 700 (1895). See also *Wiggins v. Rogers*, 175 N. C. 67, 94 S. E. 685 (1917).

The Copy Certified.—The power of an officer, who is the keeper of certain public records, to certify copies is confined to a

certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a date, appears on them. *Wiggins v. Rogers*, 175 N. C. 67, 94 S. E. 685 (1917).

A "Copy" of the Instrument Required.—This section makes competent only the

"copies" of official records, etc., and a mere certified statement from the register's office is only evidence of the correctness of the record, and can not be admitted in evidence in place of the original record. *State v. Champion*, 116 N. C. 987, 21 S. E. 700 (1895), approved in *Wiggins v. Rogers*, 175 N. C. 67, 94 S. E. 685 (1917).

Original Record Admitted.—This section does not prevent the admission in evidence of the original record itself. *State v. Voight*, 90 N. C. 741 (1884); *State v. Abernathy*, 94 N. C. 545 (1886). See also, *State v. Hunter*, 94 N. C. 829 (1886); *Riley & Co. v. Carter*, 165 N. C. 334, 81 S. E. 414 (1914); *Blalock v. Whisnant*, 216 N. C. 417, 5 S. E. (2d) 130 (1939).

Original Record Lost.—A certified copy of a petition in a suit is admissible in evidence upon proof of the loss of the original records. *Weeks v. McPhail*, 128 N. C. 130, 38 S. E. 472 (1901). See also 5 N. C. Enc. Dig. 511 et seq.

Where a superior court record is lost, a certified copy of the transcript of the same in the Supreme Court is sufficient evidence of the record. *Aiken v. Lyon*, 127 N. C. 171, 37 S. E. 199 (1900).

Incriminating Evidence Contained in

Document.—Where the document admitted under the provisions of this section contains incriminating evidence, the defense often interposed by the accused is that to admit such paper would be in violation of the constitutional right of the defendant on trial for crime to have opportunity to confront his accusers and the witnesses offered to sustain the charge. It is settled, however, that this section is not violative of this constitutional right, since these provisions constitute a well-recognized exception to the privilege given by the Constitution. *State v. Behrman*, 114 N. C. 797, 19 S. E. 220 (1894); *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907). In reference to this point Mr. Greenleaf says: "The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation, but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future. The Constitution indorsed the general principle, subject to these exceptions, merely naming and describing it sufficiently to indicate the principle intended." Greenleaf on Evidence, § 163.—Ed. Note.

§ 8-35. Authenticated copies of public records.—All copies of bonds, contracts, notes, mortgages, or other papers relating to or connected with any loan, account, settlement of any account or any part thereof, or other transaction, between the United States or any state thereof or any corporation all of whose stock is beneficially owned by the United States or any state thereof, either directly or indirectly, and any person, natural or artificial; or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the State or the United States or of any corporation all of whose stock is beneficially owned by the United States or by any state thereof, directly or indirectly, shall be received in evidence and entitled to full faith and credit in any of the courts of this State when certified to by the chief officer or agent in charge of such public office or of such office of such corporation, or by the secretary or an assistant secretary of such corporation, to be true copies, and authenticated under the seal of the office, department, or corporation concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed. (1891, c. 501; Rev., s. 1617; C. S., s. 1780; 1939, c. 149.)

Cross References. — As to records judicially noticed, see § 8-3 and notes thereto, and also §§ 1-157, 8-4.

Editor's Note.—The 1939 amendment rewrote this section.

The matters appearing in transcript of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence by virtue of the provisions of this section. *Wallace Bros. v. Douglas*, 114 N. C. 450,

19 S. E. 668 (1894). See also, *Hinton v. Lake Drummond Canal Co.*, 166 N. C. 484, 82 S. E. 844 (1914).

Authentication Essential. — Proper authentication is essential to the admission in evidence of the copies of the original records, and papers purporting to be exemplification from the Treasury Department of the United States, not authenticated, will not be admitted. *Mott v. Ramsay*, 92 N. C. 152 (1885).

Parol Evidence Inadmissible.—The con-

tents of the original record may not be proved by parol evidence under this section, but must be shown by a certified copy.

National Surety Co. v. Brock, 176 N. C. 507, 97 S. E. 417 (1918).

§ 8-36. **Authenticated copy of record of administration.**—When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of such state or territory, shall be allowed as evidence. (1834, c. 4; R. C., c. 44, s. 7; Code, s. 1343; Rev., s. 1618; C. S., s. 1781.)

§ 8-37. **Certificate of Commissioner of Motor Vehicles as to ownership of automobile.**—In all civil actions, arising out of an injury to person or property by reason of the operation of a motor vehicle of any kind, evidence as to the display numbers on a particular car, a copy of the record kept by the Commissioner of Motor Vehicles of such display numbers and the persons who obtained them, certified under the hand and seal of said Commissioner of Motor Vehicles shall be competent evidence of the ownership of the motor vehicle inflicting the injury or doing the damage. (1931, c. 88, s. 1; 1943, c. 650.)

Cross Reference.—As to registration and certificate of title for motor vehicles generally, see § 20-50 et seq.

Editor's Note.—The 1943 amendment substituted "Commissioner of Motor Vehicles" for "Commissioner of Revenue."

ARTICLE 3A.

Findings, Records and Reports of Federal Officers and Employees.

§ 8-37.1. **Finding of presumed death.**—A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P. L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U. S. C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. (1945, c. 731, s. 1.)

§ 8-37.2. **Report or record that person missing, interned, captured, etc.**—An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in § 8-37.1, or by any other law of the United States to make same, shall be received in any court, office or other place in this State as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 731, s. 2.)

§ 8-37.3. **Deemed signed and issued pursuant to law; evidence of authority to certify.**—For the purposes of §§ 8-37.1 and 8-37.2 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been

certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 731, s. 3.)

ARTICLE 4.

Other Writings in Evidence.

§ 8-38. Proof by attesting witness not required.—It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration. (1905, c. 204; Rev., s. 1604; C. S., s. 1782.)

Cross Reference. — As to essentials of registration, see § 47-1 et seq. and § 31-12 et seq.

§ 8-39. Parol evidence to identify land described.—In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest. (1891, c. 465, s. 1; Rev., s. 1605; C. S., s. 1783.)

Cross Reference. — As to vagueness of description in deeds, see § 39-2 and notes thereto.

In General.—A deed which fails to describe any land is as void now as it was before the passage of this section. But a description by name, where lands have a known name, is sufficient. *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796 (1905).

This section applies only where there is a description which can be aided by parol, but not when there is no description. *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539 (1893); *Hemphill v. Annis*, 119 N. C. 514, 26 S. E. 152 (1896); *Harris v. Woodward*, 130 N. C. 580, 41 S. E. 790 (1902).

This rule has been sanctioned by the courts, not only upon the idea that there must be a certain subject matter, but because its observance is essential to a proper enforcement of the statute of frauds. *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. 891 (1890).

Ambiguous or Indefinite Terms.—Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written. *Ward v. Gay*, 137 N. C. 399, 49 S. E. 884 (1905).

Not Retroactive in Operation.—There is

a general presumption against the retroactive operation of a statute where it would impair vested rights, therefore this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of the section. *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539 (1893).

When Description Sufficient. — A description of land in a deed as all that tract or land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. *Buckhorn Land, etc., Co. v. Yarbrough*, 179 N. C. 335, 102 S. E. 630 (1920).

While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to find but not to make a corner. *Holmes v. Sapphire Valley Co.*, 121 N. C. 410, 28 S. E. 545 (1897).

Applied in *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657 (1941).

Stated in *Peel v. Calais*, 224 N. C. 421, 31 S. E. (2d) 440 (1944).

§ 8-40. Proof of handwriting by comparison.—In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913. (1913, c. 52; C. S., s. 1784.)

In General.—The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven to be that of the party, has been changed by this section, and where the disputed writing has been rendered competent under this principle, it may, in actions instituted after March 5, 1913, be submitted to the jury, together with that admitted or proven. *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336 (1921).

Rule under Prior Law.—Before the passage of this section it was incompetent for a handwriting expert to testify to the genuineness of the signature of a party to a writing, his testimony being based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. *Boyd v. Leatherwood*, 165 N. C. 614, 81 S. E. 1025 (1914).

Same—Reasons.—In the cases decided under the prior law three reasons are given for excluding as incompetent a comparison by an expert witness of a signature or writing, not admitted to be genuine or connected with the case on trial, with a signature or writing which has been offered in writing, where the genuineness of the latter is drawn in question: (1) There is danger of fraud in the selecting of writings offered as specimens for the occasion. (2) The genuineness of specimens offered may be contested, and thus numberless collateral issues may be raised to confuse the jury and divert their attention from the real issue. (3) The opposing party may be surprised by the introduction of specimens, not admitted to be genuine, and for want of notice may fail to produce and offer evidence within his reach, tending to show their spurious character. 1 *Greenleaf on Ev.*, §§ 578 through 580; *Pope v. Askew*, 23 N. C. 56 (1840); *Outlaw v. Hurdle*, 46 N. C. 150 (1853); *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. 475 (1887); *Fuller v. Fox*, 101 N. C. 119, 7 S. E. 589 (1888). This rule was recognized in the more recent cases. *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447 (1908); *Nicholson v. Eureka Lumber Co.*, 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162 (1911); *Boyd v.*

Leatherwood, 165 N. C. 614, 81 S. E. 1025 (1914).

Expert and Nonexpert Distinguished.—A comparison of handwriting is in some states permitted to be made by the jury or experts, and in others only by experts in the presence of the jury. Where a witness has acquired a knowledge of the person's writing, he compares a disputed signature or writing with an exemplar in his own mind. But when he testifies as an expert he must first be furnished, as the basis of his testimony, with some specimen the genuineness of which may be insisted on before the jury. *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28 (1891).

Not Essential to See Person Write.—When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. *Universal Oil, etc., Co. v. Burney*, 174 N. C. 382, 93 S. E. 912 (1917).

Comparison by Jury.—Where payment of a note sued on is pleaded and the genuineness of the signature of the payee to a receipt for the amount is in dispute, and an expert in handwriting has given his opinion upon comparing with a magnifying glass the disputed signature with the genuine one, it is not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it does not appear that it could have been to the prejudice of the appellant. As to whether this is otherwise permitted under the provisions of this section, *quaere?* *Gooding v. Pope*, 194 N. C. 403, 140 S. E. 21 (1927).

Analogy to Proof of Agency.—In *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336 (1921), the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is *prima facie* evidence of agency or of the genuineness of the writing admitted as a basis of

comparison, and then the testimony of the witnesses and 'the writings' (in the plural) themselves are submitted to the jury."

Handwriting Irrelevant — Exclusion as Harmless Error. — In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to let the writing be sub-

mitted to the jury, to determine its genuineness, under the statute, was a harmless error. *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336 (1921).

Cited in *In re Will of Shemwell*, 197 N. C. 332, 148 S. E. 469 (1929); *In re Williams' Will*, 215 N. C. 259, 1 S. E. (2d) 857 (1939).

§ 8-41. Bills of lading in evidence.—In all actions by or against common carriers or in the trial of any criminal action in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the State, and twenty days when the point of shipment is without the State. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; C. S., s. 1785; 1945, c. 97.)

Cross Reference. — As to definitions of bills of lading, see §§ 21-2, 21-3.

Editor's Note.—The 1945 amendment in-

serted the words "or in the trial of any criminal action" near the beginning of the section.

§ 8-42. Book accounts under sixty dollars.—When any person shall bring an action upon a contract, or shall plead, or give notice of, a set-off or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of set-off or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars. (1756, c. 57, ss. 2, 6, 7, P. R.; R. C., c. 15, s. 1; Code, s. 591; Rev., s. 1622; C. S., s. 1786.)

Terms Construed.—In an early case, the words "to make out on his oath" and "to prove," used in the former statute, were construed to be synonymous terms. *Kitchen v. Tyson*, 7 N. C. 314 (1819).

Other Sections. — Notwithstanding the restrictions contained in § 8-51, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted

to testify under this section. *Leggett v. Glover*, 71 N. C. 211 (1874). See also, *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 (1915).

This section is applicable only to actions brought under the "book-debt law," hence in an action on a contract for sawing timber, it is not necessary to set out the items in the pleadings. *McPhail v. Johnson*, 115 N. C. 298, 20 S. E. 373 (1894).

Swearing as to Price of Goods. — It is competent for a party under this section to

swear to the price, as well as to the delivery of the articles stated in his account. *Colbert v. Piercy*, 25 N. C. 77 (1842).

Same—Cross-Examination.—It is competent for the opposite party to cross-examine the party, taking his oath as required by this section, both as to the article and the prices charged, with a view to contradict or discredit him, as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause. *Colbert v. Piercy*, 25 N. C. 77 (1842).

Where Original Account Exceeds Sixty Dollars.—Under this section, a plaintiff may prove by his own oath a balance of sixty dollars, due to him, although his account produced appears to have been originally for more than sixty dollars, but is reduced by credits below that amount. *McWilliams v. Cosby*, 26 N. C. 110 (1843).

Same — Dismissal of Part for Jurisdictional Purposes.—Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars, the plaintiff can omit, or give credit for any item he may choose, so as to bring the case within the jurisdiction of a single magistrate. But after thus obtaining jurisdiction the plaintiff can not prove the account under this section for he is required to swear that the account rendered contains a true account of all the dealings. *Waldo & Co. v. Jolly*, 49 N. C. 173 (1856).

§ 8-43. Book accounts proved by personal representative.—In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (1756, c. 57, s. 2, P. R.; 1796, c. 465, P. R.; R. C., c. 15, s. 2; Code, s. 592; Rev., s. 1623; C. S., s. 1787.)

An administrator may, under this section, offer in evidence the book accounts of a decedent, containing charges against third persons, and made by him. *Bland v.*

Proof of Set-Off Allowed.—The defendant may, under this section, prove a set-off. *Webber v. Webber*, 79 N. C. 572 (1878).

Same—Book and Oath Not Exclusive Evidence.—The book and the oath under this section are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party. *Alexander v. Smoot*, 35 N. C. 461 (1852).

Books of Decedent Admissible.—Under this section it is admissible to the amount of sixty dollars to offer the book accounts of a decedent, containing charges against third persons, and made by him. *Bland v. Warren*, 65 N. C. 372 (1871).

Unverified Entries on Own Book.—A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of this section and §§ 8-43 and 8-44, especially when it has not been made to appear that the person having made them is dead or can not be had to give his sworn statement of the transaction. *Branch v. Ayscue*, 186 N. C. 219, 119 S. E. 201 (1923).

Cited in *Perry v. First-Citizens Bank, etc., Co.*, 223 N. C. 642, 27 S. E. (2d) 636 (1943).

Warren, 65 N. C. 372 (1871).

Cited in *Perry v. First-Citizens Bank, etc., Co.*, 223 N. C. 642, 27 S. E. (2d) 636 (1943).

§ 8-44. Copies of book accounts in evidence.—A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or set-off as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse

party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trials; and in that case no such copy shall be admitted as evidence. (1756, c. 57, s. 33, P. R.; R. C., c. 15, s. 3; C. C. P., s. 343c; Code, s. 593; Rev., s. 1624; C. S., s. 1788.)

Production of Original after Notice.—In all cases under this and the two preceding sections, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by

the other party. *Coxe v. Skeen*, 25 N. C. 443 (1843).

A voluntary destruction of the original will not authorize the introduction of a copy. *Coxe v. Skeen*, 25 N. C. 443 (1843).

§ 8-45. **Itemized and verified accounts.**—In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (1897, c. 480; Rev., s. 1625; 1917, c. 32; C. S., s. 1789; 1941, c. 104.)

Editor's Note.—Prior to the 1917 amendment this section was applicable only to accounts for goods sold and delivered. See *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 (1915); *La Salle Extension University v. Ogburn*, 174 N. C. 427, 93 S. E. 986 (1917). Even before the amendment of this section, where the case was not instituted "upon an account for goods sold and delivered," which fact took the proceedings beyond the operative force of this section, the case was not necessarily dismissed on this account, when the additional evidence offered served to enable the jury to determine the amount of damages to which the plaintiff was entitled. See *Gainesville, etc., Hospital Ass'n v. Hobbs*, 153 N. C. 188, 69 S. E. 79 (1910).

The 1941 amendment made this section applicable to rents.

Purpose.—This section was designed to facilitate the collection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 (1915).

Verification Essential.—An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to show an indebtedness. *Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537 (1902).

Competency of Witness Required.—Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and when it appears on the face of the account that he has no personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the ex parte account so verified should not be received in evidence. *Nall v. Kelly*, 169 N. C. 717,

86 S. E. 627 (1915). And it must appear that he is not excluded under the provision of § 8-51. See *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584 (1923).

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 (1915), cited and distinguished. *Endicott-Johnson Corp. v. Schochet*, 198 N. C. 769, 153 S. E. 403 (1930).

Subordinate to Section 8-51.—In *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584 (1923), the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, [§ 8-51] under the principle announced in *Cecil v. High Point*, 165 N. C. 431, 81 S. E. 616 (1914)." See also, *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 (1915).

Prima Facie Case.—In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show

more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. *Claus v. Lee*, 140 N. C. 552, 53 S. E. 433 (1906); *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820 (1914).

Same—Nonsuit.—Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case, under the provision of this section, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. *Nall v. Kelly*, 169 N. C. 717, 86 S. E. 627 (1915).

Same — Burden of Proof. — Where a prima facie case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that

he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness. *Carr v. Alexander*, 169 N. C. 665, 86 S. E. 613 (1915).

Account of Mercantile Corporation. — This section applied in *Wright Co. v. Green*, 196 N. C. 197, 145 S. E. 16 (1928).

Husband as Agent of Wife. — Evidence held insufficient. *Pitt v. Speight*, 222 N. C. 585, 24 S. E. (2d) 350 (1943).

Stated in *Haines v. Clark*, 230 N. C. 751, 55 S. E. (2d) 693 (1949).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.—If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. (1951, c. 262, s. 1.)

Editor's Note.—The act from which this article was codified became effective July 1, 1951.

pers filed, docketed or recorded in county offices, see §§ 153-9.1 through 153-9.7, 153-15.1 through 153-15.6.

As to photographic reproductions of pa-

§ 8-45.2. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it. (1951, c. 262, s. 2.)

§ 8-45.3. Photographic reproduction of records of Department of Revenue.—The State Department of Revenue is hereby specifically authorized to have photographed, photocopied, or microphotocopied all records of the Department, including tax returns required by law to be made to the Department, and said photographs, photocopies, or microphotocopies, when certified by the Department as true and correct photographs, photocopies, or microphotocopies, shall be as admissible in evidence in all actions, proceedings and matters as the originals thereof would have been. (1951, c. 262, s. 3.)

§ 8-45.4. Title of article.—This article may be cited as the "Uniform Photographic Copies of Business and Public Records as Evidence Act." (1951, c. 262, s. 4.)

ARTICLE 5.

Life Tables.

§ 8-46. **Mortuary tables as evidence.**—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	Expectation
10	48.7
11	48.1
12	47.4
13	46.8
14	46.2
15	45.5
16	44.9
17	44.2
18	43.5
19	42.9
20	42.2
21	41.5
22	40.9
23	40.2
24	39.5
25	38.8
26	38.1
27	37.4
28	36.7
29	36.0
30	35.3
31	34.6
32	33.9
33	33.2
34	32.5
35	31.8
36	31.1
37	30.4
38	29.6
39	28.9
40	28.2
41	27.5
42	26.7
43	26.0
44	25.3
45	24.5
46	23.8
47	23.1
48	22.4
49	21.6
50	20.9
51	20.2
52	19.5
53	18.8
54	18.1

Completed Age	Expectation
55	17.4
56	16.7
57	16.1
58	15.4
59	14.7
60	14.1
61	13.5
62	12.9
63	12.3
64	11.7
65	11.1
66	10.5
67	10.0
68	9.5
69	9.0
70	8.5
71	8.0
72	7.6
73	7.1
74	6.7
75	6.3
76	5.9
77	5.5
78	5.1
79	4.8
80	4.4
81	4.1
82	3.7
83	3.4
84	3.1
85	2.8
86	2.5
87	2.2
88	1.9
89	1.7
90	1.4
91	1.2
92	1.0
93	.8
94	.6
95	.5

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C. S., s. 1790.)

Need Not Be Put in Evidence.—This section being a public act, the tables herein contained are competent as evidence without being specially put in evidence. *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482 (1897).

The mortuary table in this section is one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999 (1945).

Tables Not Conclusive.—In an action to recover damages for a personal injury, the expectation of life tables contained in this

section are not conclusive but merely evidential on the issue as to damages. *Sledge v. Lumber Co.*, 140 N. C. 459, 53 S. E. 295 (1906); *Odom v. Canfield Lumber Co.*, 173 N. C. 134, 91 S. E. 716 (1917); *Young v. Wood*, 196 N. C. 435, 146 S. E. 70 (1929). The tables must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900). See *Wachovia Bank, etc., Co. v. Atlantic Greyhound Lines*, 210 N. C. 293, 186 S. E. 320 (1936); *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937).

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, and an instruction making the expectancy set out in this section definitive and conclusive not only violates the evidence rule, but also § 1-180 prohibiting the expression of an opinion "whether a fact is fully or sufficiently proven." *Starnes v. Tyson*, 226 N. C. 395, 38 S. E. (2d) 211 (1946).

Life Expectancy of Child under Ten.—Although the tables set out in this section do not afford evidence of the life expectancy of a child under ten years of age, this does not leave the plaintiff destitute of proof, and the jury may consider evidence as to the constitution, health, vigor, habits and the like of the deceased as a basis for determining probable expectancy of life. *Rea v. Simowitz*, 226 N. C. 379, 38 S. E. (2d) 194 (1946).

This statutory mortality table is not founded on any statistical information based on experience concerning children under ten years of age and does not give or purport to give the probable expectancy of life of such infants. Hence as to them it is irrelevant. *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999 (1945).

Before a jury may consider the mortuary table there must be precedent proof of age, bringing the deceased clearly within the

class of selected lives tabulated in the table, and in the absence of such proof it is error to direct the jury to consider it. *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999 (1945).

However, a jury may consider evidence as to the constitution, health, vigor, habits and the like of an infant as a basis for determining his probable expectancy of life and other available mortality tables which list ages below ten years may be used in evidence upon proper identification and authentication. *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. (2d) 871, 162 A. L. R. 999 (1945).

Value of Life Tenancy.—When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life expectancy at the date of the execution of the deed, and the remainderman is entitled to the balance of the purchase price. *Thompson v. Avery County*, 216 N. C. 405, 5 S. E. (2d) 146 (1939).

Cited in *Waddell v. United Cigar Stores*, 195 N. C. 434, 142 S. E. 585 (1928); *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77 (1929); *White v. North Carolina R. Co.*, 216 N. C. 79, 3 S. E. (2d) 310 (1939); *McClamrock v. Colonial Ice Co.*, 217 N. C. 106, 6 S. E. (2d) 850 (1940); *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940).

§ 8-47. **Present worth of annuities.**—Whenever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of Years Annuity is to Run	Cash Value of the An- nuity of \$1
1	\$0.943
2	1.833
3	2.673
4	3.465
5	4.212
6	4.917
7	5.582
8	6.209
9	6.801
10	7.360
11	7.886
12	8.383
13	8.852
14	9.295
15	9.712

No. of Years Annuity is to Run	Cash Value of the An- nuity of \$1
16	10.106
17	10.477
18	10.827
19	11.158
20	11.469
21	11.764
22	12.042
23	12.304
24	12.550
25	12.783
26	13.003
27	13.211
28	13.406
29	13.591
30	13.765
31	13.929
32	14.084
33	14.230
34	14.368
35	14.498
36	14.621
37	14.737
38	14.846
39	14.949
40	15.046
41	15.135
42	15.219
43	15.299
44	15.374
45	15.445
46	15.514
47	15.579
48	15.641
49	15.699
50	15.754

The present cash value of the annuity for a fraction of a year may be ascertained as follows: multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year, computed at four and one-half per cent, may be considered as an annuity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of dower shall be six per cent. (1905, c. 347; Rev., s. 1627; C. S., s. 1791; 1927, c. 215; 1943, c. 543.)

Editor's Note.—The 1927 amendment inserted the words "computed at four and one-half per cent" in the last sentence.

The 1943 amendment added the proviso at the end of the section.

Interest Rate. — Annuities, under this section, must be computed at four and one-half per cent and not at six per cent. *Smith v. Smith*, 223 N. C. 433, 27 S. E.

(2d) 137 (1943).

Applicable Only to Annuities.—This section is intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it is error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. *Poe v. Railroad*, 141 N. C. 525,

54 S. E. 406 (1906). See *Brown v. Lipe*, 210 N. C. 199, 185 S. E. 681 (1936).

Cited in *American Blower Co. v. Mackenzie*, 197 N. C. 152, 147 S. E. 829 (1929).

ARTICLE 6.

Calendars.

§ 8-48. **Clark's calendar; proof of dates.**—In any controversy or inquiry in any court or before any fact finding board, commission, administrative agency or other body, where it becomes necessary or pertinent to determine any information which may be established by reference to a calendar for any year between the years one thousand seven hundred and fifty-three and two thousand and two, Anno Domini, inclusive, it is permissible to introduce in evidence "Clark's Calendar, A Calendar Covering 250 Years, 1753 A. D. to 2002 A. D.," as supplemented, copyrighted, 1940, by E. D. Clark, Entry: Class AA, Number three hundred and twenty-eight thousand five hundred and seventy-three, Copyright Office of the United States of America, Washington, or any reprint of said one thousand nine hundred and forty edition certified by the Secretary of State to be an accurate copy thereof; and such calendar or reprint, when so introduced, shall be prima facie evidence that the information disclosed by said calendar or reprint thereof is true and correct. (1941, c. 312.)

ARTICLE 7.

Competency of Witnesses.

§ 8-49. **Witness not excluded by interest or crime.**—No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills. (1866, c. 43, ss. 1, 4; C. C. P., c. 342; 1869-70, c. 177; 1871-2, c. 4; Code, ss. 589, 1350; Rev., ss. 1628, 1629; C. S., s. 1792.)

Cross References.—See also, §§ 8-50, 8-51, 8-54, 8-56, and notes thereto. As to general treatment of application of the rule herein contained, see § 8-51 and notes thereto.

Editor's Note.—This section abolishes the common-law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the statutes of practically all the states.

The trend of the development of the rules of evidence has been to remove personal disqualification to testify. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

A great number of varying constructions have been given to this section, and the decisions of the cases falling hereunder are not altogether harmonious. However,

it seems settled that its provisions must be considered in the light of those contained in § 8-51 which place certain restrictions on the general rule embodied in this section. In other words, the provisions of § 8-51 form exceptions to this section, and take them from the operation of its principle, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See *Charlotte Oil, etc., Co. v. Rippey*, 124 N. C. 643, 32 S. E. 980 (1899).

The construction of this section should also be in connection with the provisions of §§ 8-50 and 8-56, since they all relate to the same subject—the competency of the witnesses. *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872 (1913). This being true, a portion of the notes found under each section will necessarily have some

bearing on and may prove helpful to the practitioner in construing one or more of the other sections. A few of the decided cases are placed under this section simply to show that the general rule contained in its provisions constitutes the foundation for the decisions under the following sections.

Legatee under Will as Witness.—Under this section removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, is a competent witness to prove the fact that the script propounded was found among the papers of the deceased. Nor would the last provision of the section prevent the widow in this case from testifying, since this provision applies only to attesting witnesses to the execution of a will. *Cornelius v. Brawley*, 109 N. C. 542, 14 S. E. 78 (1891).

Beneficiary under Holograph Will.—Under this and the following section, one who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. *In re Will of Westfeldt*, 188 N. C. 702, 125 S. E. 531 (1924).

Executor as Witness.—An executor, named in a will, is a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section, and he is not dis-

qualified by § 8-51, as to transactions occurring after the death of the testator, as they can in no sense be considered as transactions between the witness and the testator. *Cox v. Beaufort County Lumber Co.*, 124 N. C. 78, 32 S. E. 381 (1899).

The widow of a deceased vendor, who was present at the sale of a mule by her husband to the plaintiff, is a competent witness under this section, and was not excluded under § 8-51, as she was not a party to the action and had no interest in the same. *Little v. Ratliff*, 126 N. C. 262, 35 S. E. 469 (1900).

Mortgagee.—Where he is not excluded under the provisions of § 8-51, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. *Clark v. Hodge*, 116 N. C. 761, 21 S. E. 562 (1895).

Fornication and Adultery.—In a trial for fornication and adultery a former defendant as to whom a *nolle prosequi* has been entered is a competent witness against the other defendant. *State v. Phipps*, 76 N. C. 203 (1877).

Party Testifying in Own Behalf.—The provisions of this section make it permissible for a party to testify in his own behalf. *State v. McIntosh*, 64 N. C. 607 (1870); *Autry v. Floyd*, 127 N. C. 186, 37 S. E. 208 (1900).

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

§ 8-50. Parties competent as witnesses.—On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation. (1866, c. 43, ss. 2, 3; Code, s. 1351; Rev., s. 1630; C. S., s. 1793.)

Cross Reference.—See also, §§ 8-49, 8-51, 8-54, 8-56 and notes thereto.

In General.—This, and §§ 8-49 and 8-51 should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872 (1913).

At common law, neither the husband nor the wife is allowed to prove the fact of access or nonaccess; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. *Boykin v. Boykin*, 70 N. C. 262 (1874).

Testimony of an Accomplice.—An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to

answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936). See Const., Art. I, § 11.

Testifying against Codefendant.—A defendant in a criminal case is, under this section, competent and compellable to testify for or against a codefendant, provided his testimony does not criminate himself. *State v. Smith*, 86 N. C. 705 (1882); *State*

v. Medley, 178 N. C. 710, 100 S. E. 591 (1919). See *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

Same—Practice Not Commendable.—The practice of sending codefendants to the grand jury to testify against each other, while allowable, is not commended. *State v. Frizell*, 111 N. C. 722, 16 S. E. 409 (1892).

Instructions Not to Incriminate Himself.—In an indictment for an affray, it is not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examines him, that he need not tell anything to incriminate himself. *State v. Weaver*, 93 N. C. 595 (1885). See *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

§ 8-50.1. Competency of evidence of blood tests.—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person.

In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person. (1949, c. 51.)

Editor's Note.—For a brief discussion of this section, see 27 N. C. Law Rev. 456.

§ 8-51. A party to a transaction excluded, when the other party is dead.—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. (C. C. P., s. 343; Code, s. 590; Rev., s. 1631; C. S., s. 1795.)

I. General Consideration.

C. Persons Deriving Title or Interest Through Two Preceding Classes.

II. The Section Disqualifies Whom.

A. Parties to the Action.

B. Persons Interested in the Event of the Action.

III. When the Disqualification Exists.

IV. Subject Matter of the Transaction.

1. General Consideration.

V. Exceptions.

2. Applications.

VI. Pleading and Practice.

Cross Reference.

See §§ 8-49, 8-50, 8-54, 8-56 and notes thereto.

I. GENERAL CONSIDERATION.

Editor's Note.—Mr. Justice Clark in *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043 (1890), gives the following analytical treatment to this section, which has been cited and approved in many of the cases coming within the principles of this section, and has proved to be a helpful guide-post for the courts in deciding as to the admissibility of the particular evidence involved in the case. It is submitted that if the practitioner, in passing upon the exclusion or nonexclusion of the evidence in the cases bearing upon this section, will carefully compare the point at issue with the clauses of the following outline, then much time will have been saved, in addition to having the assurance that he more than likely will be correct in his conclusion since, as has been said, the substantive part of this resume has been accepted by the great majority (if not all) of the courts. See *Seals v. Seals*, 165 N. C. 409, 81 S. E. 613 (1914); *Fidelity Bank v. Wy-song, etc., Co.*, 177 N. C. 284, 98 S. E. 769 (1919).

"It disqualifies—

"WHOM—1. Parties to the action.

2. Persons interested in the event of the action.

3. Persons through or under whom the persons in the first two classes derive their title or interest.

"A witness, although belonging to one of these three classes, is incompetent only in the following cases:

"WHEN—To testify in behalf of himself, or the person succeeding to his title or interest, against the representative or a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

"And the disqualification of such person, and in even such cases, is restricted to the following:

"SUBJECT MATTER.—As to a personal transaction or communication between the witness and the person since deceased or a lunatic.

"And even as to those persons and in those cases there are the following:

"EXCEPTIONS.—When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. *Burnett v. Savage*, 92 N. C.

10 (1885); *Sumner v. Candler*, 92 N. C. 634 (1885)."

A somewhat similar analysis of the statute was made by Justice Ervin in the case of *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542 (1951) as follows:

"This statute does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer:

"1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?

"2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?

"3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

"4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

"Even in instances where these four things concur, the testimony of the witness is nevertheless admissible under an exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication."

The editor has deemed it expedient to use Mr. Justice Clark's excellent outline as the basis of his analysis of the section, and, wherever possible, has adhered to the same, making no departures but only continuing the treatment by breaking the lines into further ramifications of the same subjects in order to show the component parts thereof.

Purpose of Section.—The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are sealed in death. *Abernathy v. Skidmore*, 190 N. C. 66, 128 S. E. 475 (1925).

The purpose of this section is to exclude evidence of a personal transaction or communication between the witness and a per-

son who by reason of death or lunacy cannot be heard. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526 (1928).

This section applies to actions in tort as well as actions on contract. *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832 (1934).

Reasons for Exclusion.—The exclusion of such testimony rests not merely upon the ground that the dead man can not have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action. In *re Will of Mann*, 192 N. C. 248, 134 S. E. 649 (1926).

Province of Court to Decide What Testimony May "Come In."—When a personal representative "opens the door" by testifying to a transaction, it is not in his province, but that of the court, to decide what testimony favorable to the adverse party may "come in." *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475 (1935), citing *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758 (1924).

Instruction as to Use of Section Cannot Be Obtained by Declaratory Judgment.—In an action instituted under the Declaratory Judgment Act the court has no authority to instruct a litigant whether to take advantage of the provision of this section, upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act. *Redmond v. Farthing*, 217 N. C. 678, 9 S. E. (2d) 405 (1940).

Testimony Not within Section.—Where a widow is entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and has died devising the total amount of the deposit: Held, testimony as to her receipt of the money from the crops is competent, not falling within the provisions of this section, and does not affect the title to other money owned by her husband at his death and given to her for life by his will. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526 (1928).

Same—Conversations with Living Persons.—Where the widow under the terms of the will of her husband may only dispose of the moneys in the bank to her credit, and not such as may at her death have passed to the remainderman under his will, it may be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under this section based upon

conversations with other living parties interested under the husband's will. *White v. Mitchell*, 196 N. C. 89, 144 S. E. 526 (1928).

Record Evidence.—While testimony as to personal transactions with the deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses is not precluded by this section. *Flippin v. Lindsey*, 221 N. C. 30, 18 S. E. (2d) 824 (1942).

Rehearsal of Conversation Admissible.—Direct evidence of a conversation and understanding with the plaintiff's testator is, under this section, incompetent, but a rehearsal of that conversation is a part of the *res gestae*, and admissible. *Gilmer v. McNairy*, 69 N. C. 335 (1873).

Testimony of conversations with party to action wherein witness related statements of decedent is not in contravention of this section. *Allen v. Allen*, 213 N. C. 264, 195 S. E. 801 (1938).

Personal letters written by decedent to his granddaughter, one of the propounders of his will, were held admissible over the objection that they constituted personal transactions with the deceased which are prohibited by the "dead man's statute." In *re Will of McDowell*, 230 N. C. 259, 52 S. E. (2d) 807 (1949).

Itemized and Verified Accounts.—Section 8-45 relating to itemized and verified accounts is subordinate to this section. See note of *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584 (1923), placed under § 8-45.

The provisions of this section may be waived by the adverse party. *Andrews v. Smith*, 198 N. C. 34, 150 S. E. 670 (1929).

Where an administrator brought proceedings under former §§ 1-569 et seq., to examine a defendant to discover assets of the estate of the deceased, the administrator waived the provisions of this section and the testimony thus taken could be introduced by the defendant in his own behalf. *Andrews v. Smith*, 198 N. C. 34, 150 S. E. 670 (1929).

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

Stated in *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

Cited in *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (1941) (dis. op.); *Hinson v. Morgan*, 225 N. C. 740, 36 S. E. (2d) 266 (1945); *Bell v. Chatwick*, 226 N. C. 598, 39 S. E. (2d) 743 (1946); *Ballard v. Ballard*, 230 N. C. 629, 55 S. E. (2d) 316 (1949).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Editor's Note.—The general rule is that a party is not competent to testify as to a transaction with persons since deceased; e converso, a person not a party nor interested in the event of the suit may testify as to such transaction or communication.

It will be noticed that this section excludes the testimony of "a party or person interested;" in regard to parties, however, interest is not a necessary prerequisite to the exclusion of the evidence and it was not the legislative purpose so to make it. It is immaterial whether a "party" is interested or not but a "person," of course because of the context of the section, must be interested. See *Cartwright v. Copper-smith*, 222 N. C. 573, 24 S. E. (2d) 246 (1943).

The following cases under this analysis line will demonstrate when persons are considered or are not considered parties within the meaning of this section.

A "next friend" is not a party to the suit. But his liability for costs renders him incompetent to testify to the transactions or conversations here under consideration. *Mason v. McCormick*, 75 N. C. 263 (1876). See also *McLeary v. Norment*, 84 N. C. 235 (1881).

Testimony of Guardian.—Testimony of a guardian, suing an executor to establish a gift made by a testatrix to the guardian's ward, as to what occurred between the testatrix and executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix. *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349 (1915).

Testimony of Tenant.—In an action for goods sold and delivered to the intestate, a tenant of the intestate who was furnished with goods from the plaintiff's store, and who settled with the intestate, is competent to testify in the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness is not a party to the action. *Sorrell v. McGhee*, 178 N. C. 279, 100 S. E. 434 (1919).

Probate of Will.—In a proceeding for the probate of a will, both propounders and caveators are parties within the meaning and spirit of this section. In *re Will of Brown*, 194 N. C. 583, 140 S. E. 192 (1927).

Under this section the beneficiary under a will may not testify to transactions and communications with the deceased, but he may in proceedings of *devisavit vel non*

give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. In *re Will of Brown*, 194 N. C. 583, 140 S. E. 192 (1927).

A defendant executor can not testify concerning a land transaction between himself and the intestate, in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to the defendant by the intestate. *State v. Morris*, 69 N. C. 444 (1873); *Grier v. Cagle*, 87 N. C. 377 (1882).

A member of the board of county commissioners is not a competent witness as to transactions with the defendant's intestate in a suit by the board. *Commissioners v. Lash*, 89 N. C. 159 (1883).

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with the deceased creditor. *Benedict v. Jones*, 129 N. C. 475, 40 S. E. 223 (1901).

Party Acting in Corporate Capacity.—One who is a party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased. *Commissioners v. Lash*, 89 N. C. 159 (1883).

In an action to recover for services rendered deceased, testimony by the plaintiff that plaintiff boarded deceased is incompetent under the provisions of this section. *Price v. Pyatt*, 203 N. C. 799, 167 S. E. 69 (1933).

Time and Place of Signing Receipt.—The defendant in an action for money demanded is disqualified by this section, to testify as to the time and place of signing a receipt by the plaintiff's intestate, in support of his plea of satisfaction. *Sumner v. Candler*, 86 N. C. 71 (1882).

B. Persons Interested in the Event of the Action.

1. General Consideration.

The Rule Stated.—To be incompetent under this section a witness must be either a party to the action or interested in the event thereof. Having discussed the question of "parties" under the preceding analysis line, it next becomes pertinent to examine the subject of "interest" of witnesses and other persons not parties.

To determine when such interest exists

so as to render the person incompetent, the following rule should be applied: The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action if not he is not disqualified. *Jones v. Emory*, 115 N. C. 158, 20 S. E. 206 (1894); *Henderson v. McLain*, 116 N. C. 329, 59 S. E. 873 (1907).

Nature of Interest Involved.—This section does not disqualify every witness who, in the broadest sense of the term, is interested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. *Jones v. Emory*, 115 N. C. 158, 20 S. E. 206 (1894); *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241 (1914); *In re Gorham*, 177 N. C. 271, 98 S. E. 717 (1919); *Allen v. Allen*, 213 N. C. 264, 195 S. E. 801 (1938).

It follows that a mere sentimental interest will not suffice. *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357 (1896). And it has been held that relationship of the parties alone does not constitute the direct, legal, pecuniary interest required. See *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357 (1896); *Porter v. White*, 128 N. C. 42, 38 S. E. 24 (1901); *Bennett v. Best*, 142 N. C. 168, 55 S. E. 84 (1906); *Walston v. Lowry*, 212 N. C. 23, 192 S. E. 877 (1937).

Present Interest.—In *Isler v. Dewey*, 67 N. C. 93 (1872), the court intimates that the interest necessary to disqualify is a present interest; that is, one retained by the party at the time of examination. In reaching this conclusion it was said: "Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies unknown to the common law and opposed to its principles."

In *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043 (1890), it is said: "Originally this section disqualified a fourth class of persons, i. e. those who have had an interest in the subject matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section of the Code of 1883, except in the cases in which such persons still came under the third class of disqualified persons above [see the Editor's Note and analysis line I of this note] stated."

Witness Must Be Party in Interest.—The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers

made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, is not incompetent as falling within the provisions of this section, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. *Ft. Worth, etc., R. Co. v. Hegwood*, 193 N. C. 309, 151 S. E. 641 (1930).

In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted. *Hager v. Whitener*, 204 N. C. 747, 169 S. E. 645 (1933).

Not Confined to Parties to Action.—The provisions of this section are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action. *Honeycutt v. Burleson*, 198 N. C. 37, 150 S. E. 634 (1929).

2. Applications.

No Interest in Recovery — Interest in Subject Matter.—In an action against an insane person for damages for breach of warranty in a deed, a witness who is not interested in the recovery is not disqualified by this section, though he may have an interest in the land. *Lemly v. Ellis*, 143 N. C. 200, 55 S. E. 629 (1906).

Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of this section and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial. *Pitman v. Hunt*, 197 N. C. 574, 150 S. E. 13 (1929).

Neither Husband nor Wife Is an Interested Party.—Where husband and wife instituted separate suits to recover, each respectively, for personal services rendered by them to defendant's testate, it was held that each was competent to testify for the other, since neither had a direct pecuniary interest in the action of the other, and was not therefore an interested party in the other's action within the meaning of this section, the testimony not being as to a transaction between the witness, and the deceased, but between a third party and deceased. *Burton v. Styers*, 210 N. C. 230, 186 S. E. 248 (1936).

It has been consistently held by this court that the prohibition against the testimony of a "person interested in the event"

extends only to those having a "direct legal or pecuniary interest," and not to the sentimental interest the husband or wife would naturally have in the lawsuit of the other. *Burton v. Styers*, 210 N. C. 230, 186 S. E. 248 (1936), citing *Hall v. Holloman*, 136 N. C. 34, 48 S. E. 515 (1904); *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241, L. R. A. 1917A, 1 (1914); *Vannoy v. Stafford*, 209 N. C. 748, 184 S. E. 482 (1936). See § 8-56 and note.

Where the blind husband of a grantee, in a deed reserving a life estate in the grantor, was present and heard the grantor acknowledge its execution and delivery, he was a competent witness to prove such execution and delivery, his wife having died prior to the grantor and the title therefore being vested in her son, in that his evidence disclosed no personal transaction or communication and he was not a party in interest within this section. *Turlington v. Neighbors*, 222 N. C. 694, 24 S. E. (2d) 648 (1943).

The Same Being True of Attorney Formerly Holding Note for Collection.—An attorney formerly holding a note for collection is not an interested party in an action on the note within the meaning of this section, prohibiting testimony by interested parties as to transactions with or declarations of a decedent. *Vannoy v. Stafford*, 209 N. C. 748, 184 S. E. 482 (1936).

And of Draftsman Who Failed to Insert Reversionary Clause in Deed.—In an action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, was held not precluded by this section, the draftsman not being a party interested in the event as contemplated by the statute. *Ollis v. Board of Education*, 210 N. C. 489, 187 S. E. 772 (1936).

Interest of Wife in Compensation Due Husband.—In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no interest in the event which would bar her testimony as to a transaction with the deceased, and it is competent for her to testify to the contract relied upon by her husband the plaintiff. *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241 (1914). See *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937).

In *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709 (1906), the court had held that on an issue of *devisavit vel non* it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action. This and the foregoing cases are distinguishable, however, upon the ground that in the *Linebarger* case the property in controversy was land, and the wife's inchoate dower attached immediately upon the recovery by her husband.—Ed. Note.

The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of this section, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. *Honeycutt v. Burleson*, 198 N. C. 37, 150 S. E. 634 (1929).

A husband has no vested interest in the real estate of his wife, and it would seem that he is not a "person interested in the event" within the contemplation of this section in an action involving his wife's title to realty. *Allen v. Allen*, 213 N. C. 264, 195 S. E. 801 (1938).

Widower Has No Interest in Division of Wife's Lands among Children.—When a husband and wife, each owning certain lands, enter into an agreement to pool their lands for division among their children, and the wife dies intestate before her lands are deeded in accordance with the agreement the husband has a life estate in her lands as tenant by the curtesy regardless of the disposition of the lands among the children, and therefore has no direct pecuniary interest in an action by the children to whom deeds were not executed to declare the heirs of another child estopped to assert an interest in the lands of their mother, and his testimony of the agreement with his wife is not precluded by this section. *Coward v. Coward*, 216 N. C. 506, 5 S. E. (2d) 537 (1939).

The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisions of this section. *Conley v. Cabe*, 198 N. C. 298, 151 S. E. 645 (1930).

Husband as Interested Party in Deed Drawn by Wife.—

The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment, his evidence, to the effect that his wife said to him, she would give him a horse if he would leave, was incompetent. The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent. *Whitty v. Barham*, 147 N. C. 479, 61 S. E. 372 (1908).

Husband as Interested Party in Check Given Wife.—

When a check made payable to one of the intestate's daughters and signed by the intestate was introduced in evidence to show an advancement, the daughter's husband was held competent under this section to testify over objection that the check was given his wife as a wedding present, he having no interest in the event of the action. Likewise another daughter was permitted to testify for her sister, the transaction testified to not being between the witness and deceased, but between the witness's sister and deceased father. *Vannoy v. Green*, 206 N. C. 80, 173 S. E. 275 (1934).

Interest of Depositor's Son in Action to Recover Moneys Deposited.—

In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. *Donoho v. Wachovia Bank & Trust Co.*, 198 N. C. 765, 153 S. E. 451 (1930).

Sheriff as Witness.—A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected; it was held, in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under

this section. *Allen v. Gilkey*, 86 N. C. 65 (1882).

A partner in intestate's firm may not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. *Fenner v. Tucker*, 213 N. C. 419, 196 S. E. 357 (1938).

Where one partner is (a) a party to the action, (b) is interested in the event of the action, and (c) the other partner is dead, because his lips are sealed in death the living partner is incompetent to testify in his own behalf to any transaction or communication between himself and the intestate concerning his relationship to the copartnership and to relate certain conversations he had with deceased about the assets of the partnership. *Wingler v. Miller*, 223 N. C. 15, 25 S. E. (2d) 160 (1943).

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under this section. *Wingler v. Miller*, 223 N. C. 15, 25 S. E. (2d) 160 (1943).

Testimony as to Partnership Transaction by Nonmember of Firm.—

Where the defendant's liability depends upon whether he was a member of the defendant partnership at the time the firm contracted a debt, which is the subject of the action, with the plaintiff who has since died and whose administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by the deceased of the partnership debts. *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758 (1924).

Stockholder's Interest in Recovery on Contract of Sale.—

Where defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase their respective holdings, in an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. It was held the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent under this section. *Winborne v. McMahan*, 206 N. C. 30, 173 S. E. 278 (1934).

In caveat proceedings propounders and

caveators are "parties interested in the event" within the meaning of this section. *In re Brown*, 203 N. C. 347, 166 S. E. 72 (1932).

The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. *Dill-Cramer-Truitt Corp. v. Downs*, 201 N. C. 478, 160 S. E. 492 (1931).

In this case, testimony of an endorser of a note, as to conversations with the payee's agent, now dead, showing the consideration which induced the endorsement, is not excluded under this section, the agent not being a party interested in the event within the meaning of the statute for, although the agent guaranteed all notes to the payee, if there was a failure of consideration the payee could hold neither of the guarantors and had the endorser been liable he could not have recovered from the agent. *American Agr. Chemical Co. v. Griffin*, 204 N. C. 559, 169 S. E. 152 (1933).

Effect of Insolvency of Deceased.—In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under this section is removed by the insolvency of his father's estate, for there is nothing for the children in any event of the action. *Gidney v. Logan*, 79 N. C. 214 (1878).

Holder of Insurance Policy. — A policy holder in a mutual life insurance company is not disqualified as "interested in the event of the action" to testify for the company suing to cancel another policy. *Mutual Life Ins. Co. v. Leaksville Woolen Mills*, 172 N. C. 534, 90 S. E. 574 (1916). See also *Gwaltney v. Provident Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659 (1903); *Gwaltney v. Provident Sav. Life Assur. Soc.*, 134 N. C. 552, 47 S. E. 122 (1904).

Agreement to Bequeath Property in Consideration of Services. — Where the plaintiff, in her own right and as administratrix of her mother, seeks to recover upon an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompetent for the plaintiff to testify to communications or transactions between her mother and such other

person tending to establish her demand, for she is a party interested, within the contemplation of the statute. *Brown v. Adams*, 174 N. C. 490, 93 S. E. 989 (1917).

Agreement as to Disputed Boundary. — Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication prohibited by this section. *Poole v. Russell*, 197 N. C. 246, 148 S. E. 242 (1929).

C. Persons Deriving Title or Interest Through Two Preceding Classes.

In General. — The words of this section "derives its interest or title by assignment or otherwise" mean—gets from a source—some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other manner. *Carey v. Carey*, 104 N. C. 171, 10 S. E. 156 (1889).

It should be noted, however, that interest must be present and not speculative. So it has been held that a husband is not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote. *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244 (1915).

When deceased has had no interest in lands, but was simply an assignee, evidence of his declarations is admissible as no claim of title is made under him. *Condor v. Seccrest*, 149 N. C. 201, 62 S. E. 921 (1908).

Attorney.—The fact that an attorney has had an interest in the event of a suit on account of the fee taxed does not disqualify him under this section. *Syme v. Broughton*, 85 N. C. 367 (1881). Nor is an attorney of one of the parties precluded from testifying for his client concerning the agreement. *Propst v. Fisher*, 104 N. C. 214, 10 S. E. 295 (1889).

Testimony of Grantee of Deceased Debtor.—In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was

held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. *Sutton v. Wells*, 175 N. C. 1, 94 S. E. 688 (1917).

Suits by Plaintiff against Surety. — See post, this note, "When the Disqualification Exists," III.

Trustee.—In an action by trustors against a trustee to compel an accounting for the proceeds of a foreclosure sale the incompetency of the trustor to testify as to transactions between himself and the deceased cestui que trust must be predicated upon the assumption that trustee under the deed of trust derived his "title or interest from, through or under" the cestui, and furthermore that it is this interest which is attacked. *Garrett v. Stadiem*, 220 N. C. 654, 18 S. E. (2d) 178 (1942).

III. WHEN THE DISQUALIFICATION EXISTS.

Editor's Note. — Continuing the treatment as based upon Mr. Justice Clark's resume of this section, it is proper at this place to consider the circumstances which render incompetent the testimony of the witness who comes within one or more of the three classes of persons who are disqualified by the provision of this section. It will be seen from the outline given under the analysis line "General Consideration," that the testimony of such witness is excluded in two cases, (1) when he testifies in behalf of himself, or the person succeeding to his title or interest, and (2) when the testimony is against the representative of a deceased person, or any one deriving his title or interest through him. The following cases will illustrate the principles upon which the exclusion of the testimony falling within one or both of these two subdivisions is founded. They appear in the order as stated in the outline.

Party Testifying against Interest. — Under this section a witness may testify against his own interest, even if thereby other parties to the suit are injuriously affected and the disqualification applies only when a witness testifies in his own behalf. *In re Worth's Will*, 129 N. C. 223, 39 S. E. 956 (1901).

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by this section.

In re Worth's Will, 129 N. C. 223, 39 S. E. 956 (1901); *In re Will of Fowler*, 159 N. C. 203, 74 S. E. 117 (1912).

In an action to declare a deed void on the ground that it was never delivered to the grantee, since deceased, testimony offered by the grantor tending to show that the deed had not been delivered is not incompetent under this section. *Gulley v. Smith*, 203 N. C. 274, 165 S. E. 710 (1932).

Contradicting Former Witness. — A defendant having an interest in the event of an action is not permitted under this section to testify in his own behalf, for the purpose of contradicting a former witness whose testimony tended to show that the defendant fraudulently procured an assignment from a person deceased. *Bushee v. Surles*, 77 N. C. 62 (1877).

Testifying in Favor of Representative. — Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, it was held that such testimony does not fall within the inhibition of this section, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781 (1905).

Representative Not a Party. — It is competent for a plaintiff, as a witness for himself, to testify where the representative of the deceased was not a party to the suit. *Thomas v. Kelly*, 74 N. C. 174 (1876).

Trustor as Witness. — Where a deed of trust was attacked for fraud, the trustee having died, and the property having been conveyed by a substituted trustee to the defendants, the trustor is not excluded by this section from being a witness for the plaintiff, who also claimed title through him. *Isler v. Dewey*, 67 N. C. 93 (1872).

Suits against Sureties. — Where the plaintiff sues the surety, and proposes to testify as to transactions between himself and the deceased principal of the surety, an interesting question arises which has been answered by the courts of North Carolina in a masterful manner. Is this testimony to be excluded and if so upon what grounds? In order to render the witness incompetent, the testimony must be against "the executor, administrator or survivor of a deceased person or a person deriving his title or interest from" such deceased person. From a cursory view of this problem it

would seem that the testimony is not against the principal or his executor, administrator, etc., but when the rule of law, which gives the surety an action over against the representative of the principal, is recalled this view must be abandoned. It would seem that where the testimony affects the estate either directly or indirectly (i. e. giving rise to a right of subrogation against it) such testimony must be excluded.

In *McGowan v. Davenport*, 134 N. C. 526, 47 S. E. 27 (1904), Mr. Justice Walker in an illuminating opinion discussing this subject, says: "The rule to be deduced from these authorities is that the surety, who comes not within the letter but within the intendment of the law, stands in the same position and is entitled to the same protection under § 590 of the Code as the representative of his deceased principal when sued."

Conversation before Death of One of Contracting Parties Admissible.—A witness is not incompetent, under this section, to testify to a conversation had with two persons, one of whom is dead at the time of the trial, in reference to a contract made between them and the witness. *Peacock v. Stott*, 90 N. C. 518 (1884).

Partnership.—The death of one of the partners in a firm will not incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, is living. *Peacock v. Stott*, 90 N. C. 518 (1884).

Where the conversation is not strictly with the intestate, but is one held with him and two others who were associated with him in the transaction, then the provisions of this section do not incapacitate the party from testifying. *Johnson v. Townsend*, 117 N. C. 338, 23 S. E. 271 (1895).

Testimony of Third Parties Present.—This section makes no exception where other parties are present but leaves these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit unaffected by the testimony of the interested party. *MacRae v. Molley*, 90 N. C. 521 (1884).

The administrator of a deceased guardian is a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person. *Thompson v. Humphrey*, 83 N. C. 416 (1880).

Where Adverse Party Non Compos Mentis.—A party interested in the event of the action may not testify as a witness as to a transaction with the adverse party

who at the time of trial has been adjudged non compos mentis. *Price v. Whisnant*, 232 N. C. 653, 62 S. E. (2d) 56 (1950).

Receipt of Money from Person Now Deceased.—Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent had not paid her any part thereof, and is incompetent under this section. *Wilson v. Ervin*, 227 N. C. 396, 42 S. E. (2d) 468 (1947).

Testimony by the maker of notes as to transactions with deceased payee tending to establish nonliability was properly excluded as coming within prohibition of this section. *Perry v. First Citizens Nat. Bank, etc., Co.*, 226 N. C. 667, 40 S. E. (2d) 116 (1946).

IV. SUBJECT MATTER OF THE TRANSACTION.

Not Applicable unless Transaction Is Personal.—Under this section the parties in interest are disqualified from testifying only as to personal transactions with the deceased. For instance, such party could testify that a paper writing was in the handwriting of the deceased, as will be seen from the catchline "Proof of Handwriting" following in this note, or as to any independent fact which was neither a transaction nor communication with the testator. *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225 (1888); *Cox v. Beaufort County Lumber Co.*, 124 N. C. 78, 32 S. E. 381 (1899); *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779 (1905).

This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased. *Collins v. Lamb*, 215 N. C. 719, 2 S. E. (2d) 863 (1939).

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between deceased and a third party, is not rendered incompetent by this section, since in such instances the testimony does not relate to a personal transaction or communication between the witness and deceased, and appellant's exceptions to the admission of such testimony are not sustained. *Wilder v. Medlin*, 215 N. C. 542, 2 S. E. (2d) 549 (1939).

Test as to When Transaction Is "Per-

sonal.—A fair test in undertaking to ascertain what is a “personal transaction or communication” with the deceased is to inquire whether, in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge. *Sherill v. Wilhelm*, 182 N. C. 673, 110 S. E. 95 (1921).

A personal transaction or communication within the purview of this section is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542 (1951).

Driving of Car Is “Transaction” within Meaning of Statute.—Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under this section, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832 (1934).

In an action against an administrator to recover for personal injuries, plaintiff's testimony that he was unable to drive a car and that at the time of the accident he and one other person were in the car, when taken in connection with other evidence tending to show that intestate was such other person and customarily drove the car, was within the prohibition of this section, as being of a transaction with a deceased person material in establishing liability on the part of the estate. *Davis v. Pearson*, 220 N. C. 163, 16 S. E. (2d) 655 (1941).

Transaction Must Be Exclusive Source of Knowledge.—In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal transaction with the deceased person. *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620 (1887). And it is proper to show whether

the witness had knowledge of the fact testified to, from sources extraneous to his personal communications or relations with the deceased. *Charlotte Oil, etc., Co. v. Rippy*, 123 N. C. 626, 31 S. E. 879 (1898).

Facts Occurring Out of Presence of Deceased.—A witness who offered to prove a fact which occurred out of the presence of, and which was in no sense a transaction with, a deceased person is not incompetent under this section. It is only when the transaction is between the deceased and the living party that the statute prohibits the latter from testifying. *Lockhart v. Bell*, 86 N. C. 443 (1882).

Substantive Facts.—In an action in the nature of a creditor's bill, testimony of the deceased debtor's grantee that the deceased grantor occupied the building part of the time after she got her deed to the land in litigation was held admissible as being to a substantive fact of which she had knowledge independently of any statement by the deceased. *Sutton v. Wells*, 175 N. C. 1, 94 S. E. 688 (1917).

The rule may be deduced, therefore, that a party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased or is based upon independent knowledge not derived from such source. *Sutton v. Wells*, 175 N. C. 1, 94 S. E. 688 (1917). See also *In re Will of Saunders*, 177 N. C. 156, 98 S. E. 378 (1919); *Price Real Estate, etc., Co. v. Jones, etc.*, 191 N. C. 176, 131 S. E. 587 (1926).

Conversation of Deceased with Living Defendant.—This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony “concerning a personal transaction.” *Abernathy v. Skidmore*, 190 N. C. 66, 128 S. E. 475 (1925).

Testimony Given in Former Trial.—It is competent for the plaintiff's witness to testify what the deceased maker of the note sued upon testified on a former trial as to its payment, such not being a personal transaction within the meaning of the provisions of this section. *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432 (1890); *Worth v. Wrenn*, 144 N. C. 656, 57 S. E. 388 (1907).

Proof of Handwriting.—A party interested in the event of a suit is not an incompetent witness, under this section, to prove the handwriting of the deceased person. *Rush v. Steed*, 91 N. C. 226 (1884); *Hussey v. Kirkman*, 95 N. C. 63 (1886); *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461 (1889); *Sawyer v. Grady*, 113

N. C. 42, 18 S. E. 79 (1893); *Lister v. Lister*, 232 N. C. 555, 24 S. E. (2d) 342 (1943).

The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. *Batten v. Aycock*, 224 N. C. 225, 29 S. E. (2d) 739 (1944).

These decisions are based on the distinction which is drawn between proving the handwriting and proving the actual signing of the paper, the latter being held to be a transaction within the meaning of this section while the former is not. A similar distinction was drawn in the case of *State v. Maxwell*, 64 N. C. 313 (1870), the case having been decided prior to the insertion of the word "personal" before the word "transaction." In the *Rush* case the court regards this amendment as the legislative recognition of the soundness of this distinction and says that it (the amendment) was "probably induced by the decision in *State v. Maxwell*."—Ed. Note.

A person seeking to recover for personal services rendered a decedent is precluded by this section from testifying that he expected to receive pay for his services "after she (the decedent) said go ahead" when such testimony tends to prove her agreement to pay for the services. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542 (1951).

Since personal services rendered by plaintiff to decedent are of necessity personal transactions between them, plaintiff may not testify, directly that he rendered such services nor establish this fact indirectly by testifying that he expected pay for such services or as to their value, or that he had not been paid for them. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542 (1951).

Will Cases.—In *Cox v. Beaufort County Lumber Co.*, 124 N. C. 78, 32 S. E. 381 (1899), it is held that this section does not apply to wills, but that they are governed by §§ 31-9 and 31-10; this was placed on the ground that this section applies where there is necessarily a contract or agreement between the parties, and in the case of a will there is ordinarily no transactions between the parties.

By the same reasoning it is held that attesting a will is not a "personal transaction," the witness being of the law and not of the party. *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687 (1888). Again, a beneficiary may testify as to the leaving of a

holograph will with her for safekeeping. *McEvan v. Brown*, 176 N. C. 249, 97 S. E. 20 (1918). Or to the fact that when a will was opened it contained certain erasures and that they were not made by him. In *re Will of Saunders*, 177 N. C. 156, 98 S. E. 378 (1919).

Circumstances may arise, however, in which the person interested as a beneficiary may attempt to testify as to personal transactions or conversations with the deceased and this testimony would, of course, be excluded. But the rule of exclusion does not apply, as may be inferred from the preceding cases, as to facts of which the witness had knowledge by means other than by personal transactions with the deceased. So the rule does exclude the witness from testifying as to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. In *re Will of Mann*, 192 N. C. 248, 134 S. E. 649 (1926).

Under this section a party interested in the results of the action is incompetent to testify to declaration of the deceased, whose will is under attack, when the issue is as to undue influence. In *re Will of Plott*, 211 N. C. 451, 190 S. E. 717 (1937).

This section applies to caveat proceedings notwithstanding that they are in rem, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity. In *re Lomax's Will*, 226 N. C. 498, 39 S. E. (2d) 388 (1946).

Testimony Relating Solely to Issue of Mental Capacity.—A party interested in the event may testify as to transactions with a decedent when such testimony relates solely to the issue of mental capacity. *Goins v. McLoud*, 231 N. C. 655, 58 S. E. (2d) 634 (1950).

Where a witness testifies to the want of mental capacity in a grantor to take a deed, and that his opinion was formed from conversation and communication between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded, the provisions not applying as the subject was not a "transaction" within its meaning. *McLeary v. Norment*, 84 N. C. 235 (1881); *Rakestraw v. Pratt*, 160 N. C. 436, 76 S. E. 259 (1912).

Services of Physician.—Testimony by a physician, the plaintiff, that he attended the deceased as such, for which he had an account against him, of the number of

visits, sum due therefor, etc., is incompetent as being "personal" transactions with the deceased, prohibited by this section. *Dunn v. Currie*, 141 N. C. 123, 53 S. E. 533 (1906); *Knight v. Everett*, 152 N. C. 118, 67 S. E. 328 (1910).

Sale of Property by Guardian.—It is competent for the plaintiff to prove the sale of his property by his guardian as this is not a personal transaction within the meaning of this section. *State v. Osborne*, 67 N. C. 259 (1872).

Testimony as to Placement of Deed.—This section does not exclude testimony that the witness saw the decedent place the deed, under which the witness claims, in a trunk as it does not involve a communication or transaction with him. *Cornelius v. Brawley*, 109 N. C. 542, 14 S. E. 78 (1891); *Carroll v. Smith*, 163 N. C. 204, 79 S. E. 497 (1913).

In a proceeding for dower, the decision of the question whether the plaintiff left her husband's home of her own volition or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under this section. *Hicks v. Hicks*, 142 N. C. 231, 55 S. E. 106 (1906).

Claim That Intestate Was Holder in Due Course.—Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate's possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. *Price Real Estate, etc., Co. v. Jones*, 191 N. C. 176, 131 S. E. 587 (1926).

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon "balance on account" was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by this section. *Walston v. Coppersmith*, 197 N. C. 407, 149 S. E. 381 (1929).

Sale of Interest in Partnership.—This section does not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the decedent was the other partner. *Brantley v. Marshbourn*, 166 N. C. 527, 82 S. E. 959 (1914).

Bailment.—The burden is on plaintiff

to show the contract of bailment sued on, whether express or implied, by competent evidence, and the fact that the alleged bailee is dead, rendering incompetent testimony as to any transaction or communication with him to establish the bailment, is not a circumstance to be considered in passing upon the sufficiency of the evidence actually presented. *Troxler v. Beville*, 215 N. C. 640, 3 S. E. (2d) 8 (1939).

Settlement of Estate.—Testimony relating to an agreement between administrator and distributee in regard to the settlement of an estate was incompetent in an action by distributee's administrator to recover assets. *Wilder v. Medlin*, 215 N. C. 542, 2 S. E. (2d) 549 (1939).

Possession of stock, see *Jones v. Waldrup*, 217 N. C. 178, 7 S. E. (2d) 366 (1940).

Illustrative Case.—In a civil action by plaintiffs against defendant for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by this section as personal transactions and communications with defendant's intestate. *McMichael v. Pegram*, 225 N. C. 400, 35 S. E. (2d) 174 (1945).

V. EXCEPTIONS.

Similar Evidence Previously Introduced.—This section does not apply where evidence, similar to that which is being introduced, has previously been introduced and the door has been opened to the objecting party. *Davidson v. West Oxford Land Co.*, 126 N. C. 704, 36 S. E. 162 (1900).

Testimony otherwise incompetent under this section is rendered admissible when the personal representative of a deceased person, or the committee of a lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony as to declarations of the deceased person or lunatic is given in evidence concerning the same transaction or communication. *Peek v. Shook*, 233 N. C. 259, 63 S. E. (2d) 542 (1951).

The door is opened, under this section, by the representative of deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens

the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction. *Batten v. Aycock*, 224 N. C. 225, 29 S. E. (2d) 739 (1944).

Grounds for Exceptions.—The rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified. *Pope v. Pope*, 176 N. C. 283, 96 S. E. 1034 (1918). Where the testimony, of a deceased adverse party has been given and is available, the reason for the exclusion rule ceases. *Phillips v. Intestate Land Co.*, 174 N. C. 542, 94 S. E. 12 (1917).

In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence must relate to the particular subject matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. *Walston v. Copper-smith*, 197 N. C. 407, 149 S. E. 381 (1929).

Limitation of the Exception. — Where the door is opened to the opposing party to testify for himself, he can testify only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. *Sumner v. Candler*, 92 N. C. 634 (1885).

Testimony of Representative of Deceased.—When defendant, representative of deceased, is examined in behalf of himself and his co-representative concerning a personal transaction between plaintiff and deceased, under this section, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction. *Batten v. Aycock*, 224 N. C. 225, 29 S. E. (2d) 739 (1944).

Illustrations. — Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that

when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person, does not apply. *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 753 (1924).

It is incompetent as a transaction with a deceased person for the plaintiff to testify as to personal services rendered to the deceased as coming within her demand for damages. *Pulliam v. Hoge*, 192 N. C. 459, 135 S. E. 288 (1926), wherein the court said: "We do not think the defendant 'opened the door' by asking the plaintiff for an explanation as to why she had changed the amount at her demand."

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. In *re Lomax's Will*, 226 N. C. 498, 39 S. E. (2d) 388 (1946).

VI. PLEADING AND PRACTICE.

Effect of Failure to Object.—Objections to the competency of testimony must be taken in due time; if not, they are waived. Therefore, where a party was allowed to testify, upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination the defendant objected to the competency of such testimony and asked that it might be excluded, it was held that, although incompetent, the objection to its reception came too late. *Meroney v. Avery*, 64 N. C. 312 (1870). Where a general objection as to witness' competency was overruled, and afterwards no specific objection was made to his testimony as to transactions with the decedent, the objection will be deemed waived. *Norris v. Stewart*, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917 (1890).

The objection will not be considered unless so specific as to show that the evidence is objectionable. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621 (1889). The incompetency must appear at the time of the objection to the evidence, so that the court may pass intelligently upon the objection. *Harris v. Harris*, 178 N. C. 7, 100 S. E. 125 (1919).

When Admission of Evidence Harmless.—The erroneous admission of evidence of transactions with deceased persons pro-

hibited by this section becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. *Ray v. Ray*, 175 N. C. 290, 95 S. E. 550 (1918).

Determination on Appeal of Relevancy of Testimony.—Where testimony of trans-

actions or communications with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under this section will not be determined on appeal. *Pendleton v. Spencer*, 205 N. C. 179, 170 S. E. 637 (1933).

§ 8-52. Communications between attorney and client.—In cases where fraud upon the State is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same. (1874-5, c. 213; Code, s. 1349; Rev., s. 1620; C. S., s. 1797.)

Statutory Exception.—This section, providing that communications to counsel, in cases of fraud where the State is concerned, are not privileged, constitutes a statutory exception to the general rule

privileging communications made to an attorney where the relation of attorney and client exists. *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286 (1889).

§ 8-53. Communications between physician and patient.—No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1885, c. 159; Rev., s. 1621; C. S., s. 1798.)

Editor's Note.—See 13 N. C. Law Rev. 326; 16 N. C. Law Rev. 53.

In General.—The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. *State v. Martin*, 182 N. C. 846, 109 S. E. 74 (1921).

If the statements were privileged under this section, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. *Sawyer v. Weskett*, 201 N. C. 500, 160 S. E. 575 (1931).

What Information Included.—It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or

surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. *Smith v. Roper Lumber Co.*, 147 N. C. 62, 60 S. E. 717 (1908). See *Creech v. Sovereign Camp, W. O. W.*, 211 N. C. 658, 191 S. E. 840 (1937).

Relationship of Physician and Patient Must Exist.—The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and this section is not applicable. *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928).

The relationship of patient and physician within the purview of this section, does not exist between a defendant and an alienist examining him in regard to his sanity. *State v. Litteral*, 227 N. C. 527, 43 S. E. (2d) 84 (1947).

Privilege May Be Waived.—The privilege given by this section is for the benefit

of the patient alone, and it may be insisted on or waived at his discretion, subject to the exceptions included in the section. *Fuller v. Knights of Pythias*, 129 N. C. 318, 40 S. E. 65 (1901); *Smith v. Roper Lumber Co.*, 147 N. C. 62, 60 S. E. 717 (1908). See *Creech v. Sovereign Camp*, W. O. W., 211 N. C. 658, 191 S. E. 840 (1937).

Judge's Finding of Record That Testimony Necessary.—Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in

the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. *Metropolitan Life Ins. Co. v. Boddie*, 194 N. C. 199, 139 S. E. 228 (1927). See *Creech v. Sovereign Camp*, W. O. W., 211 N. C. 658, 191 S. E. 840 (1937).

Cited in *State v. Wade*, 197 N. C. 571, 150 S. E. 32 (1929).

§ 8-54. Defendant in criminal action competent but not compellable to testify.—In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to incriminate himself. (1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4; 1881, c. 89, s. 3; 1881, c. 110, ss. 2, 3; Code, ss. 1353, 1354; Rev., ss. 1634, 1635; C. S., s. 1799.)

Cross References.—See Const., Art. I, § 11. As to provision in preliminary examination, see § 15-89. As to exceptions, i. e., where witness is not excused from testifying on ground that testimony will tend to incriminate him, see §§ 1-357, 14-38, 14-354, 18-8, 18-27.

Editor's Note.—For article discussing the limits to self-incrimination, see 15 N. C. Law Rev. 229. For note concerning confessions, see 23 N. C. Law Rev. 364. As to compelling accused to speak so that witness may identify his voice, see note in 27 N. C. Law Rev. 262.

Common-law disqualification removed by this section. *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917 (1942).

Privilege and Not a Duty.—A defendant in a criminal matter can only be examined as a witness by his own request. *State v. Ellis*, 97 N. C. 447, 2 S. E. 525 (1887).

Treated as Other Witnesses.—When the defendant exercises this privilege he is treated just as any other witness and thereby subjects himself to all the disadvantages of that position. *State v. Efler*, 85 N. C. 585 (1881); *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623 (1894); *State v. Austin*, 223 N. C. 203, 25 S. E. (2d) 613 (1943).

Where a defendant in a criminal prose-

cution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. *State v. Griffin*, 201 N. C. 541, 160 S. E. 826 (1931).

Extent of Cross-Examination Permitted.—Cross-examination of a defendant under this section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. *State v. Dickerson*, 189 N. C. 327, 127 S. E. 256 (1925).

Testimony May Be Used in Subsequent Trial.—Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. *State v. Simpson*, 133 N. C. 676, 45 S. E. 567 (1903).

Failure to Take Stand.—The failure of the prisoner charged with homicide to take the witness stand voluntarily will not create a presumption against him. *State v. Bynum*, 175 N. C. 777, 95 S. E. 101 (1918).

Court need not charge that failure of defendant to testify should not be considered

against him in absence of request. *State v. Jordan*, 216 N. C. 356, 5 S. E. (2d) 156 (1939).

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819 (1940).

Same—How Far Subject to Comment.—The introduction or non-introduction of a party as a witness in his own behalf should be the subject of comment only as the introduction or non-introduction of any other witness might be. *Goodman v. Sapp*, 102 N. C. 477, 9 S. E. 483 (1889).

The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. *State v. McNeill*, 229 N. C. 377, 49 S. E. (2d) 733 (1948).

"It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all, certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial, as a matter of sound discretion." *Gragg v. Wagner*, 77 N. C. 246 (1877).

General Character Can Be Shown.—When a prosecutor or defendant in a criminal action goes upon the stand as a witness he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. *State v. Spurling*, 118 N. C. 1250, 24 S. E. 533 (1896).

Same—Not in Issue unless So Placed.—Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the

purpose of contradicting him. *State v. Foster*, 130 N. C. 666, 41 S. E. 284 (1902); *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154 (1908).

When defendant does not go upon the stand, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State. *State v. Proctor*, 213 N. C. 221, 195 S. E. 816 (1938).

Same—Where Introduced by Defendant.—When the defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such. *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154 (1908).

The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. *State v. Hice*, 117 N. C. 782, 23 S. E. 357 (1895); *State v. McKinnon*, 223 N. C. 160, 25 S. E. (2d) 606 (1943).

"In declaring him to be 'a competent witness' we understand the statute to mean that he shall occupy the same position with any other witness, be under obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited * * * But by availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness." *State v. Efler*, 85 N. C. 585 (1881); *State v. Traylor*, 121 N. C. 674, 28 S. E. 493 (1897).

Same—Put in Issue by State.—Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad, it was held that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. *State v. Traylor*, 121 N. C. 674, 28 S. E. 493 (1897).

Where There Are Two or More Defendants.—Even prior to the enactment of this section on a trial for an affray one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. *State v. Hamlet*, 85 N. C. 520 (1881).

Testifying as to Confessions.—The defendant in a criminal action is competent as a witness in his own defense upon the preliminary hearing of the trial judge, as

to whether confessions he had made to the officers of the law were voluntarily made or induced from him contrary to law. *State v. Whitener*, 191 N. C. 659, 132 S. E. 603 (1926).

Admission before Magistrate.—There is a distinction to be observed between the statement made by a prisoner on his preliminary examination before a magistrate under § 15-89, and his testimony given under this section as a witness on the trial of the cause. On the former, he is to be advised of his rights, and such examination is not to be on oath. On the latter, accused, at his own request, but not otherwise, is competent but not compellable to testify, and, of course, his testimony thus given is received under the sanction of an oath. *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560 (1944).

Where the examining magistrate takes the preliminary statement of a prisoner under the compulsion of an oath, contrary to the provisions of § 15-89, and without the advice of counsel, such statement may not be used against him on the trial, because, being thus induced, it is deemed to be involuntary. But this has no application to the testimony of a defendant given voluntarily as a witness in his own behalf under this section. *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560 (1944).

Where a prisoner made certain confessions which were induced by hope, and therefore inadmissible, but a day or so after, upon his examination before a committee magistrate, he asked to be examined as a witness on his own behalf, when he admitted that he had made the confessions, but said that they were not true, it was held, that his evidence given before the magistrate was admissible against him, and it was for the jury to say whether they believed the confession, or that part of his evidence declaring that the confessions were not true. *State v. Ellis*, 97 N. C. 447, 2 S. E. 525 (1887).

Weight Given Testimony Is for Jury.—

While the interpretations of this section require defendant's testimony to be scrutinized, it is the province of the jury to determine from his demeanor and the attending circumstances the weight which they will accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., is held to impose a burden and cast a

shadow upon his testimony greater than the law requires and to constitute reversible error. *State v. Wilcox*, 206 N. C. 691, 175 S. E. 122 (1934).

Constitutional Provision as to Self-Incrimination.—See N. C. Const., Art. I, § 11, and notes thereto.

Erroneous Instructions. — While it is proper for the court to instruct the jury to scrutinize testimony of a defendant in a criminal prosecution because of his interest in the verdict, it is error for the court to fail to follow such instructions with a charge that if after such scrutiny the jury finds him worthy of belief they should give his testimony as full credit as they would that of any other witness. *State v. Dee*, 214 N. C. 509, 199 S. E. 730 (1938).

An instruction that the jury should scrutinize defendant's testimony in his own behalf because of his interest in the verdict, but if after doing so they were satisfied he told the truth, they should give his testimony the same weight they would give that of any "interested witness," perforce impeaches the testimony of defendant contrary to this section, and the pertinent decisions, and constitutes prejudicial error. *State v. Dee*, 214 N. C. 509, 199 S. E. 730 (1938).

A charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. *State v. Austin*, 223 N. C. 203, 25 S. E. (2d) 613 (1943).

Proper Instruction. — The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, were held without error upon defendant's exception. *State v. Horne*, 209 N. C. 725, 184 S. E. 470 (1936).

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him, will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. *State v. Wood*, 230 N. C. 740, 55 S. E. (2d) 491 (1949).

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

Cited in *State v. Colson*, 194 N. C. 206, 139 S. E. 230 (1927); *State v. McLeod*, 198 N. C. 649, 152 S. E. 895 (1930); *State v. Spivey*, 198 N. C. 655, 153 S. E. 255 (1930); *State v. Vernon*, 208 N. C. 340, 130 S. E. 590 (1935); *York v. York*, 212 N. C. 695, 194 S. E. 486 (1938).

§ 8-55. Testimony enforced in certain criminal investigations; immunity.—If any justice of the peace, magistrate of police, mayor of a town, or

judge of the Supreme or superior courts shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro bank, faro table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such faro bank, faro table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a subpoena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, mayor or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro bank, faro table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate, mayor or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; Code, ss. 1050, 1215; 1889, c. 355; Rev., ss. 1637, 3721; 1913, c. 141; C. S., s. 1800.)

Cross Reference.—See also, § 18-27.

Section Constitutional.—This section is not unconstitutional by reason of the Fifth Amendment to Constitution of the United States, because it does not apply to the State; nor does it violate Article I, § 11, Constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. In re Briggs, 135 N. C. 118, 47 S. E. 403 (1904).

Witness Compellable to Testify.—In a prosecution for gaming a witness may be

compelled to testify, although his answer tends to criminate him, since he is pardoned for the offense. *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033 (1903).

Sufficiency of Indictment.—In an indictment for keeping a common gaming house the use of the word "gaming" is sufficient. *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033 (1903).

Cited in *State v. Foster*, 228 N. C. 72, 44 S. E. (2d) 447 (1947).

§ 8-56. Husband and wife as witnesses in civil action.—In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (1866, c. 43, ss. 3, 4; C. C. P., s. 341; Code, s. 588; Rev., s. 1636; 1919, c. 18; C. S., s. 1801; 1945, c. 635.)

Cross References.—As to competency thereto. See also, § 8-50.
in criminal actions, see § 8-57 and notes

Editor's Note.—The 1945 amendment

struck out the words "except to prove the fact of marriage" formerly appearing after the words "on account of adultery" in the second sentence, and added the proviso at the end of the sentence.

For note on privileged communications between husband and wife, see 15 N. C. Law Rev. 282. As to competency of husband and wife to testify in action for criminal conversation, see 26 N. C. Law Rev. 206.

In General. — Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. *Barringer v. Barringer*, 69 N. C. 179 (1873).

Section Does Not Render Voluntary Disclosure Incompetent. — This section means that neither shall be compelled to disclose any such confidential communication, but does not perforce render a voluntary disclosure thereof incompetent. *Hagedorn v. Hagedorn*, 211 N. C. 175, 189 S. E. 507 (1937), citing *Nelson v. Nelson*, 197 N. C. 465, 149 S. E. 585 (1929).

Divorce for Adultery.—In divorce for alleged adultery, neither the husband nor the wife is a competent witness. *Horne v. Horne*, 75 N. C. 101 (1876); *Perkins v. Perkins*, 88 N. C. 41 (1883).

In the wife's action for criminal conversation with her husband and the alienation of his affections, testimony by the wife relative to statements made to her by her husband tending to show his illicit relationship with defendant are incompetent. *Knighten v. McClain*, 227 N. C. 682, 44 S. E. (2d) 79 (1947).

Contradiction by Wife.—Under this section, a wife, sued for divorce for adultery, is competent to deny the evidence of witnesses that she was guilty of adultery with them. *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673 (1902).

§ 8-57. Husband and wife as witnesses in criminal actions.—The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, or to prove the fact of marriage in case of criminal cohabitation in violation of the provisions of G. S. 14-183, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, and/or his children, or for neglecting to provide for her support, and/or the support of his children, it shall be lawful to examine the wife in behalf of the State against the husband. (1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c.

Same — Criminal Conversation. — In an action for criminal conversation wherein the husband has testified to immoral relations between his wife and the defendant, the wife is a competent witness for the defendant for the purpose of refuting the charges made against her character. *Chestnut v. Sutton*, 204 N. C. 476, 168 S. E. 680 (1933).

Confidential Communications Defined.—The confidential communications made between husband and wife which neither will be compelled to disclose, are those which are communicated "during their marriage." *Whitford v. North State Life Ins. Co.*, 163 N. C. 223, 79 S. E. 501 (1913).

Same — Protected. — The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433 (1895).

In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action are properly excluded when the letters are obtained by a third party with the consent of the wife, the letters being privileged communications and inadmissible against either the husband or the wife. *McCoy v. Justice*, 199 N. C. 602, 155 S. E. 452 (1930).

Where a witness for the State has written a letter to his wife, and his wife, without his knowledge or consent, has given the letter to the defendant, the witness cannot be cross-examined relative to the letter in an attempt to prove bias. *State v. Banks*, 204 N. C. 233, 167 S. E. 851 (1933).

Applied, in action by husband for criminal conversation, in *Rouse v. Creech*, 203 N. C. 378, 166 S. E. 174 (1932). See *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

Cited in *Nelson v. Nelson*, 197 N. C. 465, 149 S. E. 585 (1929).

110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C. S., s. 1802; 1933, c. 13, s. 1; 1933, c. 361; 1951, c. 296.)

Cross Reference.—As to competency in civil action, see § 8-56 and notes thereto.

Editor's Note. — The 1933 amendments inserted in the fourth sentence the words "and/or his children" following the word "wife" and the words "and/or the support of his children" following the word "support." For criticism of amendments, see 11 N. C. Law Rev. 231.

The 1951 amendment inserted in the fourth sentence the words "or to prove the fact of marriage in case of criminal cohabitation in violation of the provisions of G. S. 14-183".

In General.—Under this section the husband or wife is a competent witness for the defendant in all criminal actions or proceedings. But neither is competent or compellable to give evidence against the other in any criminal proceeding. *State v. Harrison*, 94 N. C. 885 (1886). See *State v. Watson*, 215 N. C. 387, 1 S. E. (2d) 886 (1939).

Under this section a wife is neither competent nor compellable to testify against her husband in a criminal proceeding, hence hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, is inadmissible. *State v. Reid*, 178 N. C. 745, 101 S. E. 104 (1919). See *State v. Cotton*, 218 N. C. 577, 12 S. E. (2d) 246 (1940).

Discretion of Trial Judge.—Where the defendant husband is alleged to have stolen certain property, it is competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduces her in proper time it rests within the discretion of the trial judge whether her testimony will be received. *State v. Lemon*, 92 N. C. 791 (1885).

A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. *State v. Tola*, 222 N. C. 406, 23 S. E. (2d) 321 (1942).

Confidential Communication. — Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of this section and may be testified to

by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case. *State v. Freeman*, 197 N. C. 376, 148 S. E. 450 (1929).

The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433 (1895).

Husband May Testify against Wife in Assault.—Conversely to the rule enunciated in this section, that a wife may testify against her husband in actions for assault against her, it appears that a husband may testify in assaults by the wife against him, and this was so held. *State v. Davidson*, 77 N. C. 522 (1877); *State v. Alderman*, 182 N. C. 917, 110 S. E. 59 (1921).

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of this section, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. *State v. Alderman*, 182 N. C. 917, 110 S. E. 59 (1921).

The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. *State v. French*, 203 N. C. 632, 166 S. E. 747 (1932).

A wife under this section is not competent to testify against her husband in a prosecution for felonious burning and the admission of her testimony entitles him to a new trial. *State v. Kluttz*, 206 N. C. 726, 175 S. E. 81 (1934).

Failure of Wife to Appear and Testify.—The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by this section, though she is competent to testify. *State v. Harris*, 181 N. C. 600, 107 S. E. 466 (1921).

Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her hus-

band on his trial for a homicide, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. *State v. Harris*, 181 N. C. 600, 107 S. E. 466 (1921).

Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of this section by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed. *State v. Harris*, 181 N. C. 600, 107 S. E. 466 (1921).

During the absence of the judge, the solicitor in his argument to the jury called the jury's attention to the fact that defendant's wife had not testified in his behalf, and persisted in the argument after objection by defendant's counsel. Upon its return, the court sustained the objection, and near the conclusion of its charge to the jury stated that the law did not permit such comment and that the jury should not let the argument influence it. Held: The solicitor's comment violates this section, and was prejudicial, and called for prompt peremptory and certain caution by the court not only that the argument should be disregarded but that the failure of defendant's wife to testify should not be considered to his prejudice, and the action of the court in merely sustaining the objection and the caution later given by the court near the conclusion of the charge is insufficient to free the case of prejudice. *State v. Helms*, 218 N. C. 592, 12 S. E. (2d) 243 (1940).

Threats. — In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. *State v. Rice*, 222 N. C. 634, 24 S. E. (2d) 483 (1943).

Abandonment of Wife. — Under this section the wife is a competent witness against her husband as to the fact of abandonment, or neglect to provide adequate support. *State v. Brown*, 67 N. C. 470 (1872).

Proof of Marriage. — The wife is competent to prove the fact of marriage under an indictment against her husband for

abandonment. *State v. Chester*, 172 N. C. 946, 90 S. E. 697 (1916). The holding was otherwise under a former wording of the statute. *State v. Brown*, 67 N. C. 470 (1872).

Same—Bigamy.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. *State v. Melton*, 120 N. C. 591, 26 S. E. 933 (1897). See also *State v. McDuffie*, 107 N. C. 885, 12 S. E. 83 (1890).

Same—Bigamous Cohabitation. — Conceding that in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife is competent to testify against the husband to prove the fact of marriage, her testimony is limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, is incompetent. *State v. Setzer*, 226 N. C. 216, 37 S. E. (2d) 513 (1946).

Adultery Prior to Marriage.—Where a man and woman are indicted for fornication and adultery, and a nol. pros. is entered as to the feme defendant, the husband of the woman is a competent witness to show adultery between the defendants committed before the marriage of the woman and the witness. *State v. Wiseman*, 130 N. C. 726, 41 S. E. 884 (1902).

Consolidation of Prosecutions against Husband and Wife.—Where husband and wife are separately indicted for the same homicide and the prosecutions are consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, is to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony is necessarily inculpatory of the husband and impinges this section, and his motion for a mistrial and severance at the conclusion of the State's evidence should have been granted. *State v. Cotton*, 218 N. C. 577, 12 S. E. (2d) 246 (1940).

Competency of Divorced Parties.—A divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. *State v. Raby*, 121 N. C. 682, 28 S. E. 490 (1897).

Applied in *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

§ 8-58. **Wife may testify in applications for peace warrants.**—The wife shall be competent to make affidavit and testify in applications for peace warrants against the husband. (1933, c. 13, s. 2.)

ARTICLE 8.

Attendance of Witness.

§ 8-59. **Issue and service of subpoena.**—In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to wit:

In suits where witnesses are to appear at any court, the clerk at the instance of a party shall issue a subpoena, directed to the sheriff or other officer of the county where such witnesses reside, naming the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned. Every subpoena made returnable immediately shall be issued only in term time, and shall be personally served on the witness therein named. A copy of every subpoena issued by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy certified by the sheriff or other officer, and left as aforesaid, shall be deemed a legal summons, and the person therein named shall be bound to appear in the same manner as if personally summoned. (1777, c. 115, s. 36, P. R.; R. C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C. S., s. 1803.)

Cross Reference.—As to duty of clerk to issue subpoena, see § 2-16.

§ 8-60. **Attendance before referee or commissioners.**—In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referee, order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, naming the day and place when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned. (1805, c. 685, ss. 1, 2, P. R.; R. C., c. 31, s. 68; Code, s. 1366; Rev., s. 1640; C. S., s. 1804.)

§ 8-61. **Subpœna duces tecum issued.**—In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the State, or in any office of any court, shall become necessary, the court may issue the process of subpœna duces tecum, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpoena to testify. (1797, c. 476, P. R.; R. C., c. 31, s. 81; Code, s. 1372; Rev., s. 1641; C. S., s. 1805.)

§ 8-62. **Subpœnas and depositions upon removal of cause.**—When any cause shall be removed from the superior court of one county to that of another, after the order of removal, depositions may be taken in the cause, and subpœnas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpœnas or commissions issued. (1810, c. 787, P. R.; 1832, c. 8; R. C., c. 31, s. 72; Code, s. 1371; Rev., s. 1642; C. S., s. 1806.)

Cross Reference.—As to depositions generally, see § 8-71 et seq.

In General.—Until the transcript is deposited the removal is not consummated and the cause is not constituted so as to give full jurisdiction to the court to which the removal is ordered, hence to meet this situation the provision of this section gives to the clerk of either court the power to

issue subpoenas for witnesses. *Commissioners v. Lemly*, 85 N. C. 342 (1881).

Upon removal jurisdiction of the court from which the cause is removed ceases, unless otherwise provided in the order of removal, or by consent of the parties in writing, duly filed. *Fisher v. Cid Copper Min. Co.*, 105 N. C. 123, 10 S. E. 1055 (1890).

This section, however, makes one exception to the general rule by allowing the subpoena to be issued from either court. *Fisher v. Cid Copper Min. Co.*, 105 N. C. 123, 10 S. E. 1055 (1890).

Time for Depositing Transcript.—The

party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. *Fisher v. Cid Copper Min. Co.*, 105 N. C. 123, 10 S. E. 1055 (1890).

§ 8-63. Witnesses attend until discharged; effect of nonattendance.—Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the State, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (1777, c. 115, ss. 37, 38, 43, P. R.; 1799, c. 528, P. R.; 1801, c. 591, P. R.; R. C., c. 31, ss. 60, 61, 62; Code, s. 1356; Rev., s. 1643; C. S., s. 1807.)

Cross Reference.—See also, §§ 6-51, 6-62.

Duty to Attend.—When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. *State v. Gwynn*, 61 N. C. 445 (1868).

Nonattendance Need Not Be Wilful.—This section does not require that the failure of the witness to attend should be "wilful." In *re Pierce*, 163 N. C. 247, 79 S. E. 507 (1913).

When Witness May Elect.—Where two subpoenas are served upon a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. *Icehour v. Martin*, 44 N. C. 478 (1853).

Test of Inability to Attend.—In an early case, *Eller v. Roberts*, 25 N. C. 11 (1842), it was held that where a witness alleges that he was unable to attend court, this

inability must be decided by reference to the modes of traveling which are in use in the community.

Where Service Had on Transient.—A witness, who is summoned in this State, while casually here, but who resides in another state, cannot be required to pay a forfeiture for nonattendance, if he has returned to his own state and is there at his domicile. *Kinzey v. King*, 28 N. C. 76 (1845).

Attorney Not Exempt.—A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In *re Pierce*, 163 N. C. 247, 79 S. E. 507 (1913).

An issue in bastardy is not a "criminal prosecution" so as to subject a defaulting

witness to the fine of eighty dollars, prescribed by this section. *Ward v. Bell*, 52 N. C. 79 (1859).

Applied in State v. Perry, 210 N. C. 796, 188 S. E. 639 (1936) (dis. op.).

§ 8-64. **Witnesses exempt from civil arrest.**—Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence. (1777, c. 115, s. 44, P. R.; R. C., c. 31, s. 70; Code, s. 1367; Rev., s. 1644; C. S., s. 1808.)

Common-Law Rule Not Repealed. — This section does not serve to repeal the common-law rule of exemption of witnesses from civil arrest. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947 (1898).

Not Applicable to Criminal Proceeding. —The exemption of witnesses from civil arrest accorded by this section, and of non-resident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceedings. *White v. Underwood*, 125 N. C. 26, 34 S. E. 104 (1899).

Procedure for Claiming Exemption.—Where a party has not been granted the exemption from service of summons

(which the courts seem to have placed on the same plane as the exemption from civil arrest), his remedy is not a motion to dismiss the action, but a motion, on special appearance, to set aside the return of service. *Dell School v. Pierce*, 163 N. C. 424, 79 S. E. 687 (1913). This is because the service is not void but voidable. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947 (1898).

Nonresident Attorney. — This section does not prevent service of summons on a nonresident attorney in this State to represent his clients in a matter pending in the federal court. *Greenleaf v. Peoples Bank*, 133 N. C. 292, 45 S. E. 638 (1903).

ARTICLE 9.

Attendance of Witnesses from without State.

§ 8-65. **Definitions.**—"Witness" as used in this article shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness. (1937, c. 217, s. 1.)

Editor's Note.—See 15 N. C. Law Rev. 345. S. E. (2d) 840 (1948); *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

Cited in *Hare v. Hare*, 228 N. C. 740, 46

§ 8-66. **Summoning witness in this State to testify in another state.**—If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies, under the seal of such court, that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which

the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate shall be *prima facie* evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be *prima facie* proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 2.)

Cross Reference. — As to effect of non-attendance of witness, see § 8-63.

§ 8-67. Witness from another state summoned to testify in this State.—If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court, stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this State he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State. (1937, c. 217, s. 3.)

Cross References.—See also, § 8-66. As to effect of nonattendance of witness, see § 8-63.

§ 8-68. Exemption from arrest and service of process.—If a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be sub-

ject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

If a person passes through this State while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not while so passing through this State be subject to arrest or the services of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons. (1937, c. 217, s. 4.)

Cross Reference.—See also, § 8-64.

A nonresident defendant while in the State in compliance with conditions of a bail bond is not exempt from the service of process. *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840 (1948).

Res Judicata.—In an action against the driver of a car upon whom service of summons was had while he was in the State in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the court's finding from the evidence that defendant was a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the State in obedience to the coroner's summons. In a subsequent action arising out of the same collision, brought in another county by the adminis-

trator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. It was held that the prior adjudication that defendant was a nonresident and was exempt from service under this section was in the nature of a judgment in rem and is res judicata as to the status and residence of the defendant, and is binding upon the administrator under the maxim *res judicata pro veritate accipitur*, and the holding of the court in the second action upon substantially the same evidence that defendant was a resident of this State and that the service of summons on him was valid must be reversed on appeal even though supported by evidence. *Current v. Webb*, 220 N. C. 425, 17 S. E. (2d) 614 (1941).

Applied in *Bangle v. Webb*, 220 N. C. 423, 17 S. E. (2d) 613 (1941).

§ 8-69. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1937, c. 217, s. 5.)

§ 8-70. Title of article.—This article may be cited as "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings." (1937, c. 217, s. 6.)

ARTICLE 10.

Depositions.

§ 8-71. Manner of taking depositions in civil actions.—Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this State or of any other state or foreign country, or any commissioner of oaths or commissioner of deeds of any foreign country, or by any officer of the army of the United States or marine corps having the rank of captain or higher, by any officer of the United States navy or United States coast guard having the rank of lieutenant, senior grade, or higher, or by any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, without a commission issuing from the court. No official seal shall be required of said military or naval officials, but they shall sign their name, designate rank, name of ship or military division, and date, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all

such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent, subject, however, to such objections as subsequently might be made according to law.

Any party in a civil action or special proceeding pending in the courts of this State, may take the depositions of any person in the armed forces of the United States or any person in the service of the United States government in a civilian capacity while serving outside of continental United States, by filing in the office of the clerk of the court where such action or proceeding is pending, a statement showing the name and post office or fleet post-office address of such person, together with the written interrogatories which are desired to be propounded to such person, and serve a copy thereof on the adverse party or parties to such action, or their attorneys, whereupon, within ten days after the service of said copy, said adverse party or parties may file in said clerk's office such written cross-interrogatories as said adverse party or parties may desire to propound to such person, and after the expiration of said ten days, and as promptly as may be, the clerk of said court shall issue a commission to any commissioned officer of any of the armed forces of the United States, without otherwise naming him, with which the person to be so examined is connected, and mail the same, together with said interrogatories and cross-interrogatories, if any, to the person so to be examined, at the address stated, authorizing any such officer upon presentation of such papers to him to propound the interrogatories and cross-interrogatories to said person, under oath, and record his answers thereto, and the deposition so taken shall be signed by such person and sworn to before, and subscribed by, his said officer, and returned to the said clerk in a sealed envelope.

Any deposition taken in the manner herein provided and transmitted to the clerk of the court where such action or special proceeding is pending, shall be deemed legal evidence, if the witness be competent, subject to opening such deposition and passing upon the same as provided by this section. (R. C., c. 31, s. 63; 1881, c. 279; Code, s. 1357; 1893, c. 360; Rev., s. 1652; 1911, c. 158; C. S., s. 1809; 1943, c. 160, s. 1; 1945, c. 22; 1947, c. 781; 1949, c. 864.)

Editor's Note.—As this section originally stood, it contained many restrictive clauses which no longer appear.

The 1943 amendment added to the second paragraph the provisions relating to commissioners of oaths or deeds and to officers in the armed forces and in the merchant marine. Section 2 of the amendatory act validated depositions already taken by an officer of the armed forces as provided in the said paragraph. For comment on the amendment, see 21 N. C. Law Rev. 346.

The 1945 amendment, commented on in 23 N. C. Law Rev. 339, added the last two paragraphs; and the 1947 amendment added the reference to objections at the end of the third paragraph.

The 1949 amendment inserted near the beginning of the fourth paragraph the words "or any person in the service of the United States government in a civilian capacity while serving outside of continental United States."

Many of the cases cited in the following note were decided prior to the 1945 and 1949 amendments, incorporating into

the statute an alternative method for obtaining the depositions of persons in the armed forces or government service of the United States, and should be read in light of the difference in procedure required.

Purpose of Section.—The purpose of this section is to save the inconvenience and cost of taking witnesses to the court, unless the party desiring the testimony of the witness sees fit to summon him to attend the court and testify in person. *Sparrow v. Blount*, 90 N. C. 514 (1884).

The competency, in proper cases, of written depositions for the production of proof in civil actions is unquestioned. In such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, with opportunity to cross-examine. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904 (1943).

Optional with Party Desiring the Evidence.—A party may take the deposition; he is not obliged to do so and it is optional with him whether he will or not. *Sparrow v. Blount*, 90 N. C. 514 (1884).

Right of Cross-Examination.—Where a

cause has been referred and regularly proceeded with before a commissioner to take deposition therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. *Sugg v. St. Mary's Oil Engine Co.*, 193 N. C. 814, 138 S. E. 169 (1927).

Presumed Regular.—The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place. *Younce v. Broad River Lumber Co.*, 155 N. C. 239, 71 S. E. 329 (1911).

May Be Taken in Place of Business. — It is not error to take a deposition in the place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876 (1902).

May Be Taken before Answer. — The plaintiff is not required to delay taking the deposition of a witness in a cause until after the answer is filed. *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743 (1909).

Leading Question. — It is discretionary with the trial judge whether or not answers to leading questions shall be stricken out of the deposition. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876 (1902).

Necessity of Sealing.—A deposition must be sealed up by the commissioners, so as to prevent inspection and alteration; it need not be certified under the seal of the commissioners. *Ward v. Ely*, 12 N. C. 372 (1828).

Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open, it was held that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner, and therefore, that the clerk had done right in passing upon and allowing such deposition to be read. *Hill v. Bell*, 61 N. C. 122 (1867).

Name of Witness in Commission Not Essential. — It is not necessary that the commission issued for taking depositions name the particular witness to whose depositions exceptions are taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. *Jeffords v. Albemarle Waterworks*, 157 N. C. 10, 72 S. E. 624 (1911).

Signature of Witness Unnecessary. — Where a deposition is otherwise regular and identified, it should not be refused as evidence because it has not been signed by the witness whose testimony was being taken, this not being required by our statute. *Boggs v. Cullowhee Min. Co.*, 162 N. C. 393, 78 S. E. 274 (1913). And the fact that it was signed when neither party was present is not ground for refusing to admit it. *Riff v. Yadkin, etc., Co.*, 189 N. C. 585, 127 S. E. 588 (1925).

Question Need Not Be Written.—In the taking of a deposition, interrogatories are not required to be in writing, and when there is nothing to indicate that the deposition does not contain the whole of the deponent's testimony or that it was not written down at the time and in the presence of the witness, a motion to quash should be refused. *Chippewa Valley Bank v. National Bank*, 116 N. C. 815, 21 S. E. 688 (1895).

Attachment or Identification of the Papers.—While it is customary, and the better practice, to attach to a deposition a paper-writing therein referred to, or, if there are more than one deposition, to attach it to one and identify it by reference in the others, and in case the writing is a matter of record or in the custody of the court, over which the parties have no control, to attach an exemplified copy; it is not required by our statutes that the writing be so attached, and when this has not been done, the fact of identity may be proved as any other fact in evidence. *In re Will of Clodfelter*, 171 N. C. 528, 88 S. E. 625 (1916).

As to waiver of formal defects, see note of *McArter v. Rhea*, 122 N. C. 614, 30 S. E. 128 (1898), under § 8-81.

Notice to Adverse Party Required. — A party offering to read a deposition as evidence must prove that he has given the notice of the opening of the deposition before the clerk prescribed by this section, or show facts that would amount to a waiver by the opposite party of the statutory requirement. *Berry v. Hall*, 105 N. C. 154, 10 S. E. 903 (1890). See § 8-72 and notes thereto.

Power of Clerk. — This section allowing the clerk to pass upon depositions only applies to the depositions of competent witnesses; where, therefore, he passed upon and allowed one to be read which was taken out of the county, under a commission without a seal, it was held, that such action of his might well be disregarded by the court trying the cause. *Sehorn v. Williams*, 51 N. C. 575 (1859).

An Appeal Essential for Review by Court.—The superior court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision. *Hix v. Fisher*, 60 N. C. 474 (1864).

Qualification of Commissioner Presumed.—A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown. *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936 (1892).

Mistake in Name.—Where the notice to take depositions correctly states the name of the commissioner appointed to take them, and is otherwise regular, it is error for the trial judge to exclude the depositions, as evidence, on account of a slight error in the spelling of the commissioner's name. *Hardy v. Phoenix Mut. Life Ins. Co.*, 167 N. C. 22, 83 S. E. 5 (1914).

Commissioner Related to Parties.—The commissioner should not be related to either of the parties, but the burden of proving this relationship rests upon the movant. *Younce v. Broad River Lumber Co.*, 155 N. C. 239, 71 S. E. 329 (1911).

Same—Objection.—An objection that a commissioner to take depositions is related to one of the parties must be taken at the time of opening such depositions before the clerk. *Kerr v. Hicks*, 131 N. C. 90, 42 S.

E. 532 (1902).

Duty of Witness to Answer.—The commissioner acts for the court and it is the duty of the witness to answer proper questions propounded by him, just as though the examination is conducted before the judge or clerk. *Bradley, etc., Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893).

Delay of Commission Insufficient for Continuance.—Commissions to take testimony are issued at the instance, and for the benefit, of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience. But if through laches or from a wish to delay the trial, he should not do so, the non-execution of the commission will be adjudged an insufficient reason for asking a continuance. *Duncan v. Hill*, 19 N. C. 291 (1837).

Attorney Mailing Deposition to Clerk.—Where the notary public taking a deposition in another state seals the same in an envelope addressed to the clerk of the superior court, the fact that the attorney of the party offering the deposition in evidence brings the sealed envelope back with him to this State and drops it in the mail, as requested by the notary, does not render the deposition incompetent. *Randle v. Grady*, 228 N. C. 159, 45 S. E. (2d) 35 (1947).

§ 8-72. Notice required for taking depositions.—In taking depositions in civil actions or special proceedings, written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party or his attorney. The time for serving such notice shall be as follows: Three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the State, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the State, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be taken. When a deposition is to be taken beyond the State, ten days' notice of the taking thereof shall be given, when the person whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days' notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon the party objecting to satisfy the court of the truth of his allegation. (1881, c. 279; Code, s. 1357; Rev., s. 1652; C. S., s. 1810.)

In General.—The object of the notice is to give the party an opportunity to attend and cross-examine; and, while on the one hand, a party will not be forced to attend on Sunday, or on a day when his presence is required at another place for the purpose of that very suit, so, on the other, it is held

that the principle is complied with substantially, if the notice describes the place with reasonable certainty. *Owens v. Kinsey*, 51 N. C. 38 (1858).

Variance between Notice and Certificate.—A deposition certified to have been taken at the house of J. E. was objected to be-

cause the notice was to take it at the house of J. A. E., it was held, that it would be presumed that the notice and certificate referred to the same person. *Ellmore v. Mills*, 2 N. C. 359 (1796).

Alternative Days.—A notice to take a deposition on “the 5th or 6th” of a certain month was held sufficient. *Kenedy v. Alexander*, 2 N. C. 25 (1794).

On a Particular Day for Several Successive Weeks.—Notice to take a deposition on a particular day of every week for three successive months is not good. *Bedell v. State Bank*, 12 N. C. 483 (1828).

Conflicting Dates. — Where notice is served that depositions will be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed, but where he elects to appeal by council and cross-examines the witnesses without making any objection at the time, this is a waiver as to any defect in the notice. *Ivey v. Bessemer City Cotton Mills*, 143 N. C. 189, 55 S. E. 613 (1906).

Certainty of Place.—A misdescription of a place, in one small particular, in a notice to take depositions will not be fatal, if there be other descriptive terms used in the notice, less liable to mistake, by which such place may be identified. *Pursell v. Long*, 52 N. C. 102 (1859).

Reasonableness as to Time.—Where the statute required three days’ notice of the taking of a deposition, and only two days’ notice was given and the opposite party appeared and objected to the shortness of notice, and declined to cross-examine the deponent, the deposition was rejected. In such cases the day on which notice is given is not counted, but the day on which the deposition is taken may be counted. *Beasley v. Downey*, 32 N. C. 284 (1849).

Where Parties Specially Mentioned. — Where notice was given to take the deposition of certain parties, specifically mentioned, “and others,” and depositions of those particularly mentioned were not taken, it was held to be no ground for ex-

ception. *McDugald v. Smith*, 33 N. C. 576 (1850).

The notice directing the commissioner to take the depositions of persons named “and others,” depositions taken of others than those named are admissible. In *re Will of Rawlings*, 170 N. C. 58, 86 S. E. 794 (1915).

Notice to One of Joint Defendants.—Upon a bill against joint administrators relative to the acts of the intestate, of which the administrators put in a joint answer, a deposition taken by the plaintiff upon notice to one of the defendants only was excluded, though it was the deposition of the plaintiff’s only witness, who had since died. *Cox v. Smitherman*, 37 N. C. 66 (1841).

Served at Residence of Party. — Notice of taking a deposition is sufficient, if left at a party’s residence. *Kennedy & Co. v. Fairman*, 2 N. C. 404 (1796).

Service by Constable.—A town constable cannot serve a notice to take depositions in an action pending in the superior court. *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33 (1896).

Notice by Guardian Appointed after Person Released as Sane.—Where a party to an action has become insane and placed in a State institution therefor, and is thereafter released therefrom as sane, § 122-67, the court is without authority, after his regaining his sanity, to appoint a guardian ad litem for him, § 1-65, and notice to the guardian so appointed as to the taking of depositions of witnesses does not comply with the requirements of this section, and upon objection, the depositions so taken should be excluded. *Orr v. Beachboard*, 199 N. C. 276, 154 S. E. 311 (1930).

Proof of Service.—The practice permits the person, who has served the notice that a deposition will be taken, to appear before the commissioners and swear to that fact and if it be shown by the certificate of the commissioners, the deposition may be read. *Sawrey v. Murrell*, 3 N. C. 397 (1806). As to service and proof, see 4 N. C. Enc. Dig. 695 et seq.

Absent Party or Attorney. — In taking depositions where a party lives out of the State, notice may be given to the absent party, or to his attorney in court. *Savage v. Rice*, 1 N. C. 19 (1789).

§ 8-73. Publication of notice in case of nonresident.—Instead of the notice served upon the adverse party or his attorney in taking depositions in civil actions or special proceedings, when the adverse party is a nonresident and has no attorney of record, it shall be sufficient to publish notice to the adverse party in some newspaper published in the county where the action is pending, or if no newspaper is published in such county, then in some newspaper in the judicial district, for three consecutive weeks, giving the time and place of taking the deposi-

tion and specifying the name of the witness. And when the adverse party is a non-resident and service of notice cannot be had upon him or his attorney in this State, then one publication of notice to open such deposition shall be sufficient notice. (1913, c. 137; C. S., s. 1811.)

Cross Reference.—As to publication generally, see §§ 1-98, 1-99.

Where the defendant had left for parts unknown, and his attorney in the case had died, and none other been substituted, and plaintiff was desirous of taking a deposition in New England, an order was made

directing publication for three successive weeks in a newspaper, of notice that the deposition would be taken at a certain place and day three months after publication. *Maxwell v. Holland*, 2 N. C. 302 (1796).

§ 8-74. Depositions for defendant in criminal actions.—In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, county or town in which such action is pending have ten days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. This section shall not apply to the taking of depositions in courts of justices of the peace. (Code, s. 1357; 1891, c. 522; 1893, c. 80; Rev., s. 1652; 1915, c. 251; C. S., s. 1812.)

Not Applicable to State Witnesses.—In *State v. Harris*, 181 N. C. 600, 107 S. E. 466 (1921), Stacy, J., commenting on an offer of a trial judge to allow the defense to take depositions of State's witnesses, in a dissenting opinion said: "This section provides that the defendant, in all criminal actions, may take the depositions of witnesses to be used as evidence in his behalf. But this applies to his own witnesses and not to those who testify against him. It would be strange, indeed, to say that a statute, intended to grant, as it does, a privilege to the defendant, could be used to deprive him of his constitutional guarantees. As to the witnesses offered by the State, he has the right to demand their presence in the courtroom, and to confront them with other witnesses, and to subject them to the test of a cross-examination. *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783 (1896). The prisoner may not be re-

quired to examine the State's witnesses in the absence of the jury; and the contrary suggestion of his honor, though unintentional, was prejudicial to the defendant."

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf. *State v. Finley*, 118 N. C. 1162, 24 S. E. 495 (1896).

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it. *State v. Finley*, 118 N. C. 1162, 24 S. E. 495 (1896).

§ 8-75. Depositions in justices' courts.—Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action, and in order to do so may apply to the clerk of the superior court for a commission to take the same; or such deposition may be taken by a notary public of this or any other state, or of a foreign country, without a commission issuing from the court.

The proceedings in depositions in a civil action before a justice of the peace shall be in all respects as if such action were in the superior court.

When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court. (1872-3, c. 33; Code, s. 1359; Rev., s. 1646; C. S., s. 1813; 1947, c. 781.)

Editor's Note.—The 1947 amendment re- tition to appear as the first two paragraphs wrote the former first sentence of this sec- above.

§ 8-76. Depositions before municipal authorities.—Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission, or such deposition may be taken by a notary public of this State or of any other state or foreign country without a commission issuing from the court; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this State, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition or by the notary taking such deposition, as the case may be; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court. (1889, c. 151; Rev., s. 1653; C. S., s. 1814; 1943, c. 543.)

Editor's Note.—The 1943 amendment inserted the provisions relating to notary public.

§ 8-77. Depositions in quo warranto proceedings.—In all actions for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, or a notary public, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such depositions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination, by either party on the trial, of such witnesses as they may summon in their behalf. (1889, c. 428; Rev., s. 1654; C. S., s. 1815; 1943, c. 543.)

§ 8-78. Commissioner may subpoena witness and punish for contempt.—Commissioners to take depositions appointed by the courts of this State, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this State, are hereby empowered, they or the clerks of the courts respectively in this State, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto

shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (1777, c. 115, s. 42, P. R.; 1805, c. 685, ss. 1, 2, P. R.; 1848, c. 66; 1850, c. 188; R. C., c. 31, s. 64; Code, s. 1362; Rev., s. 1649; C. S., s. 1816.)

Cross References.—As to attendance of witnesses before commissioners, etc., see § 8-60. See also, § 5-1, subsec. 6, under which refusal of witness to be sworn or answer questions amounts to contempt.

Power Not Exclusively in Commissioner.

—The power to commit to jail a person refusing to testify before a commissioner,

as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defied. *Bradley, etc., Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893).

§ 8-79. Attendance before commissioner enforced.—The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the State, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpoenaed fifty dollars, and on the trial for such penalty the subpoena issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpoena, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended. (1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2; R. C., c. 31, s. 65; Code, s. 1363; Rev., s. 1650; C. S., s. 1817.)

§ 8-80. Remedies against defaulting witness before commissioner.

—But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this State, then the same shall be certified under his hand, and returned with the subpoena to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof. (1850, c. 188, s. 2; R. C., c. 31, s. 66; Code, s. 1364; Rev., s. 1651; C. S., s. 1818.)

§ 8-81. Objection to deposition before trial.—At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing. (1869-70, c. 227, ss. 13, 17; Code, s. 1361; 1895, c. 312; 1903, c. 132; Rev., s. 1648; C. S., s. 1819.)

Purpose of Section.—The purpose of 199 (1887).

this section is to settle the depositions as evidence before the trial or hearing and thus prevent surprise, misapprehension, confusion and delay on the trial. *Carroll v. Hodges*, 98 N. C. 418, 4 S. E.

Time and Manner of Objection.—As stated by the section exceptions to a deposition, especially those which relate to its regularity, should be disposed of, at the latest, before the trial is entered upon.

Barnhardt v. Smith, 86 N. C. 473 (1882); Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199 (1887); Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613 (1906). Such objection must be made in writing. Brittain v. Hitchcock, 127 N. C. 400, 37 S. E. 474 (1900).

Same—When Allowed at Trial.—Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, it was held that an objection to its reception might be taken on the trial of the action. Bryan v. Jeffreys, 104 N. C. 242, 10 S. E. 167 (1889).

Waiver of Formal Defects.—Where a party attends upon and takes part in taking depositions, he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudice to third parties. McArter v. Rhea, 122 N. C. 614, 30 S. E. 128 (1898).

§ 8-82. **Deposition not quashed after trial begun.**—No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (1869-70, c. 227, s. 12; Code, s. 1360; Rev., s. 1647; C. S., s. 1820.)

Opportunity to Object before Trial.—Where a deposition was open and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. Morgan v. Royal Fraternal Ass'n, 170 N. C. 75, 86 S. E. 975 (1915), citing Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613 (1906). And this is true whether the motion is to quash the deposition in whole or in part. Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199 (1887).

Filing as Notice.—Where the deposition had been on file for two or three months before the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. Carroll v. Hodges, 98 N. C. 418, 4 S. E. 199 (1887).

As to failure to give notice to adverse party, see note of Bryan v. Jeffreys, 104 N.

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun. Womack v. Gross, 135 N. C. 378, 47 S. E. 461 (1904); Tomlinson Chair Mfg. Co. v. Townsend, 153 N. C. 244, 69 S. E. 145 (1910).

Where the provisions of this section as to making the objection before trial and in writing are not complied with, the objection to the deposition is waived. Woodley v. Hassell, 94 N. C. 157 (1886).

For discussion of waiver in general, see 4 N. C. Enc. Dig. 706; as to cross-examination of witnesses, see 4 N. C. Enc. Dig. 707.

Cited in Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 172 S. E. 360 (1934).

C. 242, 10 S. E. 167 (1889), under § 8-81.

Preservation of Exception.—Where a commissioner to take depositions has, over the objection and exceptions of a party litigant, denied him the right of cross-examination of a witness of his opponent, and the litigant has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. Sugg v. St. Mary's Oil Engine Co., 193 N. C. 814, 138 S. E. 169 (1927).

Incompetent Questions.—Since a deposition can be quashed only for irregularities in the taking or the incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. Jeffords v. Albe-marle Waterworks, 157 N. C. 10, 72 S. E. 624 (1911).

Stated in Gulf States Steel Co. v. Ford, 173 N. C. 195, 91 S. E. 844 (1917).

§ 8-83. **When deposition may be read on the trial.**—Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.
2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.

3. If the witness is confined in a prison outside the county in which the trial takes place.

4. If the witness is so old, sick or infirm as to be unable to attend court.

5. If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

6. If the witness is the Governor of the State, or the head of any department of the State government, or the president of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.

7. If the witness is a justice of the Supreme Court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

8. If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a session of the body of which he is a member.

9. If the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

10. If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting. (1777, c. 115, ss. 39, 40, 41, P. R.; 1803, c. 633, P. R.; 1828, c. 24, ss. 1, 2; 1836, c. 30; R. C. c. 31, s. 63; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; Code, s. 1358; 1905, c. 366; Rev., s. 1645; 1919, c. 324; C. S., s. 1821.)

Cross References.—As to manner, form, and time of taking exceptions, see §§ 8-81, 8-82 and notes thereto. As to depositions in criminal actions, see § 8-74 and notes thereto.

Selected Parts.—It is not permissible to introduce selected portions of depositions without offering the whole. *Sternberg v. Crockon, etc., Co.*, 172 N. C. 731, 90 S. E. 935 (1916); *Enloe v. Charlotte Coca-Cola Bottling Co.*, 210 N. C. 262, 186 S. E. 242 (1936).

Witness Unable to Talk.—The deposition of a witness adjudged to be unable to talk or remain in court is admissible in evidence under this section. *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928 (1903).

Where Admissible in Subsequent Action.—In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence. *Hartis v. Charlotte Elect. R. Co.*, 162 N. C. 236, 78 S. E. 164 (1913). It may be introduced whether the deponent was examined as a witness in the case being tried or not. *Mabe v. Mabe*, 122 N. C. 552, 29 S. E. 843 (1898).

The difference between hearsay evidence and that obtained by deposition, as pointed out by the court in the *Hartis* case, lies in the fact that in the latter instance the testimony is taken before one who is em-

powered to administer oaths, and the adverse party is given full opportunity to cross-examine.—Ed. Note.

Same—Where Action Survives.—Where the deposition *de bene esse* of the plaintiff in an action has been taken in accordance with law, and the plaintiff has since died, but the cause of action survives, the deposition may properly be read in evidence in behalf of those who survive him in interest, and have properly been made parties to the original action. *Barbee v. Cannady*, 191 N. C. 529, 132 S. E. 572 (1926).

Meaning of "Duly Summoned."—By reasonable construction the ninth subdivision of this section means that where the deposition has been regularly taken, and where the witness is more than seventy-five miles from the place of trial without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpoena has been duly issued—not necessarily served. *Tomlinson Chair Mfg. Co. v. Townsend*, 153 N. C. 244, 69 S. E. 145 (1910). See also *Sparrow v. Blount*, 90 N. C. 514 (1884).

Stated in *Barnhardt v. Smith*, 86 N. C. 473 (1882); *Jeffords v. Albemarle Waterworks*, 157 N. C. 10, 72 S. E. 624 (1911).

Cited in *Stern & Co. v. Herren*, 101 N. C. 517, 8 S. E. 221 (1888).

§ 8-84. Depositions taken in the State to be used in another state.

—1. By Whom Obtained.—In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the State, either in the United States or any of the possessions thereof, or any foreign country, may obtain, by the proceedings prescribed by this section, the testimony of a witness and in connection therewith the production of books and papers within the State to be used in the action, suit or special proceeding.

2. Application Filed.—Where a commission to take testimony within the State has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the State pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, the person desiring such testimony, or the production of papers and documents, may present a verified petition to any justice of the Supreme Court or judge of the superior court, stating generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and he shall set forth the substance of or have annexed to his petition a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpoena to compel the production of books or papers, the petition shall specify the particular books or papers, the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken.

3. Subpoena Issued.—Upon the filing of such petition, if the justice of the Supreme Court or judge of the superior court is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall issue a subpoena to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the State, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper, by his title or office, at a time and place specified in the subpoena, to testify in the action, suit or special proceeding. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but such books and original papers shall not be taken from the witness. This subpoena must be served upon the witness at least two days, or, in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness is commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpoenaed to attend and give his testimony, may apply to the court issuing such subpoena to vacate or modify the same.

4. Witness Compelled to Attend and Testify.—If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the justice or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. Upon proof by affidavit that a person to whom a subpoena was issued has failed or refused to obey such subpoena, to be duly sworn or affirmed, to testify or answer a question propounded to him, to produce a book or paper which he has been subpoenaed to produce, or to subscribe to his deposition when correctly taken down, the justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed,

testify, answer a question propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the justice or judge shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such person should be required to appear, be sworn or affirmed, testify, answer the question propounded, produce the books or papers, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause, the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, he shall enforce the order and prescribe the punishment as hereinbefore provided.

5. Deposit for Costs Required.—The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior courts. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1903, c. 608; Rev., c. 1655; C. S., s. 1822.)

ARTICLE 11.

Perpetuation of Testimony.

§ 8-85. **Relief afforded by superior courts.**—The relief afforded in courts of equity by what is known as a “bill to perpetuate testimony” shall be afforded by the superior courts of this State. (1935, c. 254, s. 1.)

§ 8-86. **How to obtain relief.**—Such relief may be obtained either by a special proceeding before the clerk of the superior court, or by a civil action brought to the superior court in term. (1935, c. 254, s. 2.)

§ 8-87. **Rules of procedure; admissibility of testimony taken.**—Such special proceedings and civil actions shall be governed by the same rules of procedure that govern other special proceedings and civil actions; and the testimony taken therein shall be admissible in the trial of any controversy, under the same regulations and restrictions which govern depositions taken in other cases in which the taking of depositions is provided for by the laws of this State: Provided, however, the evidence so perpetuated shall not be competent against any person who was not served with notice now provided by law for the taking of depositions in civil causes to be present and cross-examine said witnesses. (1935, c. 254, s. 3.)

Cross References.—As to procedure in civil actions, see § 1-88 et seq. As to procedure in special proceeding, see § 1-393 et seq. As to depositions, see § 8-71 et seq.

§ 8-88. **Taxing costs.**—The costs of such special proceedings and civil actions shall be taxed against the party at whose instance the proceeding is instituted. (1935, c. 254, s. 4.)

ARTICLE 12.

Inspection and Production of Writings.

§ 8-89. Inspection of writings.—The court before which an action is pending, or a judge thereof, may, in its or his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both. (1821, c. 1095, P. R.; 1828, c. 7; R. S., c. 31, s. 86; R. C., c. 31, s. 82; C. C. P., s. 331; Code, s. 578; Rev., s. 1656; C. S., s. 1823.)

Editor's Note.—This section is quite similar to the provisions of § 8-90 and must be construed therewith. In many of the cases the courts have used the term "production" when more properly the term "inspection" should be used, as the case was decided primarily under the provisions of this section. The reasoning used by the courts would indicate that this use of language has not been through inadvertence, but on the other hand would seem to furnish an additional support to the statement that the two sections are kindred in their nature and substance.

Liberal Construction.—This section is remedial, and should be liberally construed to advance the remedy intended thereby to be afforded. *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928).

Discretion of Court.—Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discretion. *Dunlap v. London Guaranty, etc., Co.*, 202 N. C. 651, 163 S. E. 750 (1932).

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of such motion being in the discretion of the court, and the record failed to show that the requirements of this and the following section were met by plaintiff, or that the written statements were in court. *Star Mfg. Co. v. Atlantic Coast Line R. Co.*, 222 N. C. 330, 23 S. E. (2d) 32 (1942).

Application for Order.—While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. *Bell*

v. Murchison National Bank, 196 N. C. 233, 145 S. E. 241 (1928).

Substitute for Bill of Discovery.—This section is primarily designed and intended to afford the facilities for the ascertainment of truths that were formerly supplied by a bill of discovery. *Girard Nat. Bank v. McArthur*, 165 N. C. 374, 81 S. E. 327 (1914).

Must Be Pertinent to Issue.—Upon motion to allow inspection or copy of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. *Evans v. Seaboard Air Line R. Co.*, 167 N. C. 415, 83 S. E. 617 (1914).

Where No Information Could Be Gained.

—Under this section, a person will not be ordered to allow an inspection of the paper-writing if the party making the request knows the contents thereof. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334 (1900), wherein the court said: "The object of this section is to enable a party to get information that he did not have, or to give him more definite information, or data, than he already had."

Inspection within Specified Time.—This section only authorizes the judge to order one party to exhibit the writing to the other and require a copy to be given him or permit him to take a copy of the same, within a specified time. It was not intended that there should be an investigation of the controversies—a kind of inferior court or petty trial—with witnesses and lawyers on both sides. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334 (1900).

An examination of an adverse party, under former § 1-569 et seq., could be joined with an order under this section for an inspection of writings, in the possession or under the control of the party to be examined. *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928).

Due Notice Required.—The inspection as provided for in this section can only be had upon the order of the court, made

after due notice. *Vann v. Lawrence*, 111 N. C. 32, 15 S. E. 1031 (1892).

Same—Duration of Notice.—A notice to produce papers, etc., “on a trial to be had this day,” is not confined to a trial on that day, but extends to a trial at a subsequent term. *State v. Kimbrough*, 13 N. C. 431 (1830).

Acquiring Information Necessary to Filing of Complaint.—In an action against a clinic and doctors for alleged tortious defamation and disclosures of confidential information acquired professionally, plaintiff was held entitled to an order requiring defendants to produce specified papers and documents to afford information necessary to the filing of the complaint. *Nance v. Gilmore Clinic*, 230 N. C. 534, 53 S. E. (2d) 531 (1949), distinguishing *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. (2d) 225 (1947), in that the matter sought to be discovered in that case was not necessary as a basis for filing the complaint but related to a matter which it would have been improper to allege or which was not necessary to the statement of the cause of action. The case distinguished does not hold that the statute is not available in seeking information to enable plaintiff to draft his complaint. Only in respect to the discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent.

In an action by a stockholder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff is entitled under this section to inspect the records and books of the corporation in order to obtain information upon which to frame his complaint. This is true even though their evidence may result in pecuniary injury. *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 21 S. E. 919 (1895).

Where Information to Be Used in Action against Third Party.—Though the point was not in issue, the court in *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. (2d) 225 (1947), stated that plaintiff may not proceed under this section to examine the defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party.

Depositing the Papers Not Required.—This section does not authorize the judge or clerk to issue an order that the respondent be required to deposit the papers in the clerk's office. *Mills v. Biscoe Lumber Co.*, 139 N. C. 524, 52 S. E. 200 (1905).

Extent of Admission.—The papers, when produced by the method herein pre-

scribed, are competent evidence for all legitimate purposes. *Austin v. Secrest*, 91 N. C. 214 (1884).

Applicability of Res Judicata.—An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not res judicata and the motion can be renewed and a new order obtained. *Mills v. Biscoe Lumber Co.*, 139 N. C. 524, 52 S. E. 200 (1905).

Motion to Nonsuit.—A motion to nonsuit a plaintiff for not producing books or papers, cannot be made unless a previous order of the court has been obtained for the production of such books or papers. *Graham v. Hamilton*, 25 N. C. 381 (1843).

Where Inspection Refused.—Where the judge refuses an inspection which is of the character authorized by this section, it still rests within his discretion to compel the production of the writing later or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. *Evans v. Seaboard Air Line R. Co.*, 167 N. C. 415, 83 S. E. 617 (1914).

The affidavit supporting an order for inspection of writings must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient the order based thereon is invalid. *Dunlap v. London Guaranty, etc., Co.*, 202 N. C. 651, 163 S. E. 750 (1932); *Flanner v. Saint Joseph Home*, 227 N. C. 342, 42 S. E. (2d) 225 (1947).

An application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party which relate to the immediate issue in controversy, and which cannot be more definitely described by applicant. *Rivenbark v. Shell Union Oil Corp.*, 217 N. C. 592, 8 S. E. (2d) 919 (1940).

And Must Show Materiality and Necessity.—It is required that the affidavit set forth facts showing the materiality and necessity of the papers sought to be produced, and the mere averment that they are material and necessary is insufficient. *Patterson v. Southern Ry. Co.*, 219 N. C. 23, 12 S. E. (2d) 652 (1941).

Review.—Where the trial court, within its discretion, has ordered a party to give to the other an inspection and copy of certain books, papers or documents containing material evidence, and the order is supported by sufficient findings of fact, and there is no evidence of abuse of such

discretion, the order is not reviewable on appeal, and the appeal will be dismissed. *Abbutt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928).

Reviewal by Supreme Court.—The Supreme Court will not pass upon the propriety of discharging a rule for the production of papers under this section unless the facts are stated upon which the application is based. *Maxwell v. McDowell*, 50 N. C. 391 (1858).

Appeal Allowed.—An appeal lies from an order requiring a person to allow an inspection of paper-writings. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334 (1900).

Applied to note for purpose of taking

photographic copy thereof, in *Girard Nat. Bank v. McArthur*, 165 N. C. 374, 81 S. E. 327 (1914); in *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525 (1889), to determine the genuineness of a new promise on an indebtedness set up by the plaintiff to defendant's plea of the statute of limitations.

Stated in *McDonald v. Carson*, 94 N. C. 497 (1886); *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161 (1893); *Whitten v. Western Union Tel. Co.*, 141 N. C. 361, 54 S. E. 289 (1906).

Cited in *Sossamon v. Oaklawn Cemetery*, 212 N. C. 535, 193 S. E. 720 (1937); *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445 (1943).

§ 8-90. Production of writings.—The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default. (1821, c. 1095. P. R.; 1828, c. 7; R. C., c. 31, s. 25; Code, s. 1373; Rev., s. 1657; C. S., s. 1824.)

Discretion of Court.—When the requirements of the applicant, as set forth in the preceding section, are met, this section does nothing more than vest the granting of such application in the discretion of the judge. *Star Mfg. Co. v. Atlantic Coast Line R. Co.*, 222 N. C. 330, 23 S. E. (2d) 32 (1942).

Complaint Essential.—A court cannot under this section order the production of papers by the defendant where no complaint has been filed, so that, in case the papers are not produced, the court can render judgment for the plaintiff, according to the provision of the section. *Branson v. Fentress*, 35 N. C. 165 (1851).

Where No Answer Filed.—Where no answer has been filed, the defendant is not entitled to an order to inspect a check in possession of the plaintiff, under this section. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334 (1900).

Proof by Parol.—The contents of a paper-writing cannot be proved by parol, unless notice has been given to the adverse party, who has it in possession to produce it on trial. *Murchison v. McLeod*, 47 N. C. 239 (1855).

As to requirement of notice, see note of *Vann v. Lawrence*, 111 N. C. 32, 15 S. E. 1031 (1892), under § 8-89. As to require-

ment of pertinence to issue, see note of *Evans v. Seaboard Air Line R. Co.*, 167 N. C. 415, 83 S. E. 617 (1914), under § 8-89.

Due notice is notice sufficient to enable the party to have the document when called for. *McDonald v. Carson*, 95 N. C. 377 (1886).

Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend court, to produce papers, is not sufficient. *Beard v. Southern R. Co.*, 143 N. C. 136, 55 S. E. 505 (1906).

As to extent of admission, see note of *Austin v. Secrest*, 91 N. C. 214 (1884), under § 8-89.

Affidavit for Nonproduction.—Where the plaintiff's affidavit stated that he had not seen the letter (ordered produced) since he first sent it, that he had not knowingly destroyed it, and had made diligent search for it and could not find it, thus it was held to be sufficient cause shown for a discharge of the rule for its production. *Fuller v. McMillan*, 44 N. C. 206 (1853).

Stated in *McDonald v. Carson*, 94 N. C. 497 (1886); *Rivenbark v. Shell Union Oil Corp.*, 217 N. C. 592, 8 S. E. (2d) 919 (1940).

§ 8-91. Admission of genuineness.—Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request,

and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. (1821, c. 1095, P. R.; 1828, c. 7; R. S., c. 31, s. 86; R. C., c. 31, s. 82; C. C. P., s. 331; Code, s. 578; Rev., s. 1658; C. S., s. 1825.)

Comments by Counsel.—Counsel may comment as to the truth of the contents of an instrument as suggested by its appearance, even after the admission in writing under this section that the instrument is genuine. *Knight v. Houghtalling*, 85 N. C. 17 (1881).

Chapter 9.

Jurors.

Article 1.

Jury List and Drawings of Original Panel.

Sec.

- 9-1. Jury list from taxpayers of good character.
- 9-2. Names on list put in box.
- 9-3. Manner of drawing panel for term from box.
- 9-4. Local modifications as to drawing panel.
- 9-5. Fees of jurors.
- 9-6. Jurors having suits pending.
- 9-7. Disqualified persons drawn.
- 9-8. How drawing to continue.
- 9-9. Drawing when commissioners fail to draw.

Article 2.

Petit Jurors; Attendance, Regulation and Privileges.

- 9-10. Summons to jurors drawn; to attend until discharged.
- 9-11. Summons to talesmen; their disqualifications.
- 9-12. How talesmen summoned when sheriff interested.
- 9-13. Penalty for disobeying summons.
- 9-14. Jury sworn; judge decides competency.
- 9-15. Questioning jurors without challenge.
- 9-16. Causes of challenge to juror drawn from box.

Sec.

- 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.
- 9-18. Exemption from civil arrest.
- 9-19. Exemptions from jury duty.
- 9-20. Clerk to keep record of jurors.
- 9-21. Extra or alternate juror or jurors; challenges; compensation and duties.

Article 3.

Peremptory Challenges in Civil Cases.

- 9-22. Six peremptory challenges on each side.
- 9-23. Where several defendants; challenges apportioned; discretion of judge.

Article 4.

Grand Jurors.

- 9-24. How grand jury drawn.
- 9-25. Grand juries in certain counties.
- 9-26. Exceptions for disqualifications.
- 9-27. Foreman may administer oaths to witnesses.
- 9-28. Grand jury to visit jail and county home.

Article 5.

Special Venire.

- 9-29. Special venire to sheriff in capital cases.
- 9-30. Drawn from jury box in court by judge's order.
- 9-31. Penalty on sheriff not executing writ or jurors not attending.

ARTICLE 1.

Jury List and Drawing of Original Panel.

§ 9-1. **Jury list from taxpayers of good character.**—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1.)

Local Modification.—Macon: 1933, c. 62; Yancey: 1929, cc. 57, 65.

Editor's Note.—The 1947 amendment added the second paragraph and made other changes. For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

Session Laws 1947, c. 217, provides that this chapter as amended shall govern the making up of the jury lists and the drawing of jurors in Columbus County.

Section Directory.—The regulations contained in this section, relative to the revision of the jury lists, are directory only and, while they should be observed, the failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549 (1897); *State v. Perry*, 122 N. C. 1018, 29 S. E. 384 (1898); *State v. Bonner*, 149 N. C. 519, 63 S. E. 84 (1908).

Provisions Directory and Not Mandatory.—The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to this section, does not sustain defendant's contention that the list was not selected from the legally prescribed source, since the provisions of the statute are directory and not mandatory. *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99 (1951).

Special Statute Allowing Other Method.—Where a statute creating a special criminal court for certain counties allows every facility to the accused for getting a fair and impartial jury, it is not unconstitutional because it does not follow the same methods of drawing the jury which are provided for by the superior courts. *State v. Jones*, 97 N. C. 469, 1 S. E. 680 (1887).

Alienage.—Alienage is disqualification of a juror. *Hinton v. Hinton*, 196 N. C. 341, 145 S. E. 615 (1928).

Discrimination on Account of Race.—A defendant does not have the right to be tried by a jury of his own race, or to have a representative of any particular race on the jury, or to have any proportional representation of the races thereon, but he

is entitled to be tried by a jury from which there has been neither inclusion nor exclusion because of race. *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99 (1951).

As to discrimination against negroes in selection of jury, see 26 N. C. Law Rev. 185.

The omission of negroes from the jury list, when not excluded on account of their race, is not of itself grounds for quashing an indictment. *State v. Daniels*, 134 N. C. 641, 46 S. E. 743 (1904).

The fact that the county commissioners in selecting the jury list used only the tax returns for the preceding year without a list of names of persons not appearing thereon who were residents of the county and over twenty-one years of age, as stipulated by the amendment to this section, does not tend to show racial discrimination in the selection of prospective jurors, and defendant's objection on this ground cannot be sustained in the absence of any evidence tending to show prejudice, bad faith, or the inclusion or exclusion of persons from the list because of race. *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99 (1951).

Names of Qualified Persons Not on Jury List.—Where the county commissioners, while drawing the jurors, laid aside the names of several persons, otherwise qualified, for the reason that they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons, if there was any irregularity it did not affect the action of the jurors so drawn and summoned. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453 (1889).

Rejection of prospective jurors for want of good moral character and sufficient intelligence is available to the county commissioners as a general objection only when the jury list is being prepared, and not after the names are in the box. *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537 (1948).

As to right of women to serve on juries, see note in 25 N. C. Law Rev. 152, discussing case of *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858 (1944), denying such right. This question has now been settled

by the 1945 amendment to Art. 1, § 13 of the Constitution of North Carolina, which substituted the words "good and lawful persons" in lieu of the words "good and lawful men" formerly appearing in said constitutional provision.—Ed. Note.

Merely Purging Jury List.—Merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. *State v. Dixon*, 131 N. C. 808, 42 S. E. 944 (1902).

Section Does Not Abolish Challenge.—This section providing that good and lawful men, required by the Constitution to serve on juries, shall be men found by the county commissioners to have paid taxes for the preceding year, and of good moral character and of sufficient intelligence, did not abolish challenges to jurors, in particular actions, for bias, interest, kinship, etc. *State v. Vick*, 132 N. C. 995, 43 S. E. 626 (1903).

Juror Having Served within Two Years.—A juror of the original panel is not subject to be challenged upon the ground that he had served upon a jury in the same court within two years; only tales-jurors who have thus served are disqualified by the statute. *State v. Brittain*, 89 N. C. 481 (1883).

Payment of Taxes—Motion to Quash Indictments.—Under this section only such persons as have paid all of their taxes for

the preceding year are competent to serve as jurors or grand jurors. *Breese v. United States*, 143 F. 250 (1906). But there are many defenses to the failure to pay. For example nonpayment of taxes due to failure to put name on list of taxpayers does not of itself disqualify the juror. *Breese v. United States*, 203 F. 824 (1913). Nor does this section disqualify where the juror owned no taxable property above the exemption. *United States v. Breese*, 172 F. 761 (1908). To disqualify the failure to pay must be for the fiscal year preceding the annual revision at which the juror's name was drawn. *State v. Carland*, 90 N. C. 668 (1884); *Sellers v. Sellers*, 98 N. C. 13, 3 S. E. 917 (1887); *State v. Hargrove*, 100 N. C. 484, 6 S. E. 185 (1888); *State v. Davis*, 109 N. C. 780, 14 S. E. 780 (1891). And a juror is not disqualified when the sheriff has been enjoined from collecting his taxes. *State v. Heaton*, 77 N. C. 505 (1877).

The findings of the judge in the trial court as to whether a juror has paid his taxes is not reviewable on appeal. *State v. Carland*, 90 N. C. 668 (1884).

Formerly it was held that an indictment could be quashed if one of the members of the grand jury had not paid his taxes but this was changed by legislative enactment. See § 9-26 and note thereto.

Cited in *Haney v. Lincolnton*, 207 N. C. 282, 176 S. E. 573 (1934); *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (1941) (dis. op.).

§ 9-2. Names on list put in box.—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board. (1868-9, c. 9, s. 5; Code, s. 1726; Rev., s. 1958; C. S., s. 2313.)

Cross Reference.—See note to § 9-1.

Boxes Improperly Marked.—Where the partitions of the jury box, instead of being marked "No. 1" and "No. 2," were marked "Jurors Drawn" and "Jurors Not Drawn"; there was a lock on each partition, but one key unlocked both; there was but one key and that was placed in the custody of the register and ex officio clerk to the board of county commissioners by the chairman of the board, it was held that a special venire drawn under the directions of the

presiding judge from such boxes was legal. *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1888).

Middle Letter Entered Erroneously.—The entering on the scroll of the name J. L. B. summoned as a juror, as J. S. B. is immaterial, since the use of a middle letter forms no part of the name. *State v. Mills*, 91 N. C. 581 (1884).

Applied in *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

§ 9-3. Manner of drawing panel for term from box.—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls

except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined. (1806, c. 694, P. R.; 1868-9, c. 9, s. 6; 1868-9, c. 175; Code, ss. 1727, 1731; 1889, c. 559; 1897, c. 117; 1901, c. 28, s. 3; 1901, c. 636; 1903, c. 11; 1905, c. 38; 1905, c. 76, s. 4; 1905, c. 285; Rev., s. 1959; C. S., s. 2314.)

Local Modification.—Buncombe, Cabarrus, Catawba, Forsyth: 1933, c. 89; Guilford: 1933, c. 89; 1949, c. 568; Haywood, Iredell, Wake: 1933, c. 89.

Cross References.—See note to § 9-1. As to manner of drawing panel when commissioners fail to act, see § 9-9. As to drawing of grand jury from those returned as jurors, see § 9-24. As to drawing special veniremen, see § 9-30. As to drawing additional jurors from other counties instead of removal, see § 1-86. As to drawing jurors in recorders' courts, see § 7-250. As to drawing jurors in civil county courts, see § 7-310. As to general county courts, see § 7-288.

Section Partly Mandatory.—The portion of this section, requiring persons named on the scrolls drawn from the jury box to constitute the jury, is mandatory. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293 (1902).

But the section is directory merely so far as it relates to the action of the commissioners as to the time and place of drawing the jury. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384 (1898); *State v. Banner*, 149 N. C. 519, 63 S. E. 84 (1908).

While the provisions of the statutes fixing the number of jurors to be drawn by the county commissioners is directory, yet they are very essential to the impartial administration of justice, and their non-observance is the subject of censure, if not punishment. *State v. Watson*, 104 N. C. 735, 10 S. E. 705 (1889).

Child Draws Jurors to Prevent Fraud.—The reason for having a child not more

than ten years of age to draw the jurors is to prevent fraud in the selection of the jury, so that the law can be administered impartially and without discrimination. The child draws from the jury box the names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality. *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

Effect of Excluding Negroes from Grand Jury.—The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitutions of North Carolina and of the United States. *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

Findings That Section Complied with Conclusive.—The findings of the trial court, after hearing evidence, that the jurors were drawn, sworn and empanelled in accordance with this section, and that there was no discrimination against persons of the negro race in making up the jury lists, are conclusive on appeal when supported by sufficient evidence, in the absence of gross abuse. *State v. Cooper*, 205 N. C. 657, 172 S. E. 199 (1934). See *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733 (1930); *State v. Dalton*, 206 N. C. 507, 174 S. E. 422 (1934).

§ 9-4. Local modifications as to drawing panel.—In Buncombe County forty-eight jurors shall be drawn to serve the first week and twenty-four to serve the second week.

In Cabarrus County the board of county commissioners shall annually draw

sixty jurors for the first week of the January term of superior court of each year and thirty-six jurors for each and every other week of superior court during the year.

In Cumberland County the commissioners may, in their discretion, cause an additional twelve scrolls to be drawn, to serve as the jury for the first week.

In Forsyth County the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned. For the second week thirty jurors shall be drawn and summoned.

In Iredell County, jurors shall be drawn as follows: Forty-eight jurors for the first week of January and August terms of court and thirty for the second week of January and August and each week of the March, May and November terms of court: Provided, that if it appears desirable for the dispatch of business, the board of county commissioners may draw fifty-four jurors for the first week of the January and August terms and thirty-six for the second week of said terms and the March, May and November terms.

In McDowell County the board of county commissioners is authorized and empowered to draw as jurors from the box an additional number of jurors to those now provided by law. At each term when grand jury is to be selected, for the first week, forty-eight jurors shall be drawn and summoned, and for each subsequent week of such terms and at all other terms, both civil and criminal, or mixed, regular or special, for each week, thirty jurors shall be drawn and summoned.

In Randolph County forty-two scrolls shall be drawn for the first week and twenty-four for the second week. The commissioners may at the same time and in the same manner draw the names of twenty-four other persons who shall serve as petit jurors for the week for which they are drawn and summoned.

In Rockingham County the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned.

The commissioners of Rowan County shall cause to be drawn, as provided by law, the names of forty-eight jurors for the first week of each February term of the superior court in said county, thirty-six jurors for the first week of each term of the superior court thereafter and twenty-four jurors for the second week of each term of the superior court.

In Stokes County the commissioners shall draw for each term of the superior court, in accordance with law, twenty-four jurors, to be summoned by the sheriff of Stokes County.

In Wayne, Robeson and Granville counties the board of commissioners for the first week of each term of the superior court of said counties for the trial of civil and criminal causes shall cause to be drawn from the jury box forty-two scrolls, and for each additional week or for any court for the trial of civil causes only, said board of commissioners shall draw twenty-four scrolls; provided, that in Wayne County the forty-two scrolls required by this section shall be drawn only at the January and July criminal terms of court; at all other times, thirty-six scrolls shall be drawn from the jury box for each week. (Rev., s. 1959; 1907, c. 239; Ex. Sess. 1913, c. 4; Pub. Loc., 1915, cc. 233, 744, 764; C. S., s. 2315; 1921, c.

142; 1923, c. 107, s. 2; 1923, c. 117; 1937, c. 19, s. 4; 1939, c. 140; 1941, cc. 87, 92, 175; 1945, c. 907; 1947, c. 272; 1951, cc. 478, 1138.)

Editor's Note.—Public Laws 1921, c. 142, added the paragraph relating to Stokes County. In 1923 the paragraphs relating to McDowell County and to the counties of Wayne, Robeson and Granville were added.

Public Laws 1941, c. 92, repealed Public Laws 1937, c. 19, which added a paragraph relating to Ashe County. The 1939 amendment added the proviso relating to Wayne County which was amended by Public Laws

1941, c. 87. Public Laws 1941, c. 175, added the paragraph relating to Cabarrus County.

The 1945 amendment added the paragraph relating to Rowan County, and Session Laws 1947, c. 272, repealed the former paragraph relating to Hertford County.

The first 1951 amendment rewrote the paragraph relating to Iredell County, and the second 1951 amendment made changes in the paragraph relating to Cabarrus County.

§ 9-5. Fees of jurors.—All jurors in the superior court shall receive such amount per day as the board of commissioners of their respective counties shall fix, not less than (\$3.00) three dollars per day and not more than (\$8.00) eight dollars per day; provided, that the said commissioners of the respective counties may establish different rates of compensation for different classes of said superior court jurors within the limitations set out above.

In addition to the compensation above provided for, all jurors shall receive a travel allowance of five (5) cents per mile while coming to the county seat and returning home, the distance to be computed by the usual route of public travel; provided, that this allowance shall be paid on the basis of one round trip per calendar week for each calendar week in which attendance is required. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; C. S., s. 3892; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1; 1947, c. 1015; 1949, c. 915; 1951, c. 98.)

Local Modification. — Anson: 1947, c. 750; Bertie: 1949, c. 802; c. 914, s. 2; Chat-ham: 1947, c. 47; Columbus: 1947, c. 124; Cumberland: 1945, c. 316; Currituck: 1945, c. 269; 1947, c. 228; Davidson: 1949, c. 521; Duplin: 1949, c. 680; Durham: 1943, c. 323; Gaston: 1947, c. 206; Harnett: 1933, c. 75; Hertford: 1947, c. 59; Johnston: 1945, c. 993; Jones: 1949, c. 1002; Macon: 1951, c. 34; Martin: 1943, c. 173; Montgomery: 1951, c. 62; New Hanover: 1947, c. 619; Onslow: 1947, c. 205; Randolph: 1949, c. 854; Richmond: 1947, c. 235, s. 1; Rowan: 1945, c. 233; Swain: 1949, c. 234; Washington: 1945, c. 103.

Cross References. — As to payment of members of the grand jury in Scotland County, see § 9-25. As to payment of an alternate juror, see § 9-21. As to payment

of additional jurors from another county, see § 1-86. As to compensation of jurors at coroner's inquest, see § 152-9. As to unclaimed fees of jurors, see § 2-250. As to compensation of jurors to value division fence under the fence and stock law, see § 68-10.

Editor's Note.—The 1947 amendment rewrote this section, and the 1949 amendment rewrote the first paragraph.

The 1951 amendment increased the maximum compensation from six to eight dollars per day.

Session Laws 1945, c. 228, regulating the fees of jurors in Granville County was repealed by Session Laws 1949, c. 662, which provided that such fees shall be as provided in this section.

§ 9-6. Jurors having suits pending.—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box. (1806, c. 694, P. R.; 1868-9, c. 9, s. 7; Code, s. 1728; Rev., s. 1960; C. S., s. 2316.)

Cross Reference. — As to grand juror who has suit pending, see § 9-26.

Fundamental Objection. — The circumstance described by this section is a fundamental objection to the juror, whenever it is made to appear, and is a cause of challenge, although the county commissioners may have allowed his name to go upon the venire. *Hodges Bros. v. Lassiter*, 96 N. C.

351, 2 S. E. 923 (1887).

Such juror is incompetent, and the defendant in a criminal action is not required to show affirmatively that the juror was present and participated in the deliberations of the grand jury when the bill was found. *State v. Smith*, 80 N. C. 410 (1879).

When Suit Not Triable at Same Term. — This section disqualifies only one who

has a suit to be tried at the same term at which he is drawn to serve as a juror, and does not disqualify a party to a suit in which the summons is issued and made returnable to the term at which he is drawn to serve, but no pleadings are filed, so that it, even if thereafter brought to issue at that term, is not triable till the next term. *State v. Spivey*, 132 N. C. 989, 43 S. E. 475 (1903).

Suit Pending but Not at Issue.—A juror who has a suit “pending” but not “at issue” at the term of the court at which he has

been drawn to serve, is not disqualified under this section. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549 (1897).

Indictment Quashed When Section Violated.—An indictment was properly quashed where one of the grand jurors who found the bill was a party to an action pending and at issue in the superior court. *State v. Liles*, 77 N. C. 496 (1877); *State v. Smith*, 80 N. C. 410 (1879).

Applied in *State v. Parish*, 104 N. C. 679, 10 S. E. 457 (1889).

§ 9-7. **Disqualified persons drawn.**—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead. (1806, c. 694, P. R.; Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; Rev., s. 1961; C. S., s. 2317.)

Cited in *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537 (1948).

§ 9-8. **How drawing to continue.**—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed. (1806, c. 6, s. 94, P. R.; 1868-9, c. 9, s. 9; Code, s. 1730; Rev., s. 1962; C. S., s. 2318.)

Cross Reference. — See § 9-3 and notes thereto.

§ 9-9. **Drawing when commissioners fail to draw.**—If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners, in the presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed; and if a special term continues for more than two weeks, then for the weeks exceeding two a jury or juries may be drawn as in this section provided. (1868-9, c. 9, s. 11; Code, s. 1732; Rev., s. 1963; C. S., s. 2319.)

Time When Names Must Be Drawn.—This section does not require a jury to be drawn twenty days or more before the term but when considered with the preceding sections it is evident that the drawing must be done within the twenty days. Even if the twenty days were required as a time limited it would be regarded as directory only. *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850 (1917).

Deputy Sheriff Included.—The provision of this section refers to sheriffs in the generic sense, including deputies within its

meaning to perform a duty of a ministerial nature in the sheriff's name; and where the deputy thus acts at the request of the sheriff, a challenge to the panel on that account alone will not be sustained. *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850 (1917).

Court May Order Jury Drawn.—Where, upon failure of the commissioners to draw a jury for a third week of court, the court orders the same to be drawn as prescribed by this section, such jury is legal. *Leach v. Linde*, 108 N. C. 547, 13 S. E. 212 (1891).

ARTICLE 2.

Petit Jurors; Attendance, Regulation and Privileges.

§ 9-10. **Summons to jurors drawn; to attend until discharged.**—The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such

court. The summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned. Jurors shall appear and give their attendance until duly discharged. (1779, c. 157, ss. 4, 6, P. R.; R. C., c. 31, s. 29; 1868-9, c. 9, s. 12; Code, s. 1733; Rev., s. 1976; C. S., s. 2320.)

Cross Reference.—As to penalty for disobeying summons, see § 9-13.

§ 9-11. Summons to talesmen; their disqualifications.—That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court. (1779, c. 156, s. 69, P. R.; R. C., c. 31, s. 29; Code, s. 1733; Rev., s. 1967; 1911, c. 15; 1915, c. 210; C. S., s. 2321.)

Local Modification. — Halifax: 1949, c. 635.

Editor's Note.—See 11 N. C. Law Rev. 218.

Tales Jurors Defined.—A tales is a supply of such men as are summoned on the first panel in order to make up the deficiency. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665 (1890).

Qualifications of Tales Juror. — A tales juror must have the same qualification as a regular juror, with the additional one of being a freeholder. *State v. Sherman*, 115 N. C. 773, 20 S. E. 711 (1894). This includes the requirement as to being a taxpayer. *State v. Hargrove*, 100 N. C. 484, 6 S. E. 185 (1888); *State v. Sherman*, 115 N. C. 773, 20 S. E. 711 (1894). But it is not a disqualification of such a juror that his name does not appear on the list of the county commissioners. *Lee v. Lee*, 71 N. C. 139 (1874).

Selection.—Although this section seems to imply that tales jurors are to be selected from bystanders, it is the practice and within the powers of the court and of the executive officers, acting under the court's orders, to go outside for the purpose of selecting talesmen, or to notify them in advance when such a course best promotes the ends of justice. *Lupton v. Spencer*, 173 N. C. 126, 91 S. E. 718 (1917).

None of Original Panel Necessary.—The trial judge, in his discretion, may discharge any jurors or jury, and is not required to reserve one juror of the original panel to "build to," before directing the sheriff to summons tales jurors as authorized by this

section. *State v. Manship*, 174 N. C. 798, 94 S. E. 2 (1917).

"Freeholders"—A freeholder is one who owns land in fee, or for life, or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds. *State v. Ragland*, 75 N. C. 12 (1876). The realty must be situated in the county where the court is held. *State v. Cooper*, 83 N. C. 671 (1880). A mortgagor in possession is a freeholder within the meaning of this section. *State v. Ragland*, 75 N. C. 12 (1876). But not so with the holder of a license to lay off an oyster bed. *State v. Young*, 138 N. C. 571, 50 S. E. 213 (1905).

A finding by the trial judge that persons drawn were not freeholders is conclusive on appeal. *State v. Register*, 133 N. C. 746, 46 S. E. 21 (1903).

An order for a special venire properly specifies that the veniremen are to be freeholders. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Regular Jurors Discharged.—Where the regular jurors have been discharged by the trial judge for the term, evidently under the impression that the business of the court was over, and on the following day there remains a criminal case regularly coming up for trial on a defect of jurors, the judge, within his discretion, is authorized to direct the sheriff to summons "other jurors, being freeholders within the county," whether within or without the courthouse. *State v. Manship*, 174 N. C. 798, 94 S. E. 2 (1917).

Instruction of Court Held Not to Be an

Order under This Section.—Where upon adjournment the court instructed the sheriff to summon a number of men to act as talesmen in a case proposed to be called for the next day and upon the trial defendants moved that none of the men so summoned and none of the jurors already in the box should serve, but that the jury be selected from bystanders, it was held that the instruction of the court was not an or-

der under this section for talesmen or a special venire, and that the jurors summoned being subject to all the qualifications of talesmen, and defendants having failed to exhaust their respective challenges to the poll, defendants' exceptions to the refusal of their motions could not be sustained. *State v. Anderson*, 208 N. C. 771, 182 S. E. 643 (1935).

§ 9-12. How talesmen summoned when sheriff interested.—When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff. (1889, c. 441; Rev., s. 1968; C. S., s. 2322.)

Applied in *Boyer v. Teague*, 106 N. C. 577, 11 S. E. 665 (1890); *Lupton v. Spencer*, 173 N. C. 126, 91 S. E. 718 (1917).

§ 9-13. Penalty for disobeying summons.—Every person on the original venire summoned to appear as a juror who fails to give his attendance until duly discharged shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court; but each delinquent juror shall have until the next succeeding term to make his excuse for his nonattendance, and, if he renders an excuse deemed sufficient by the court, he shall be discharged without costs. Every person summoned of the bystanders who shall not appear and serve during the day as a juror shall be fined in the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs. (1779, c. 157, s. 4, P. R.; 1783, c. 189, P. R.; 1806, c. 694, P. R.; R. C., c. 31, s. 30; Code, ss. 405, 1734; Rev., s. 1977; C. S., s. 2323.)

§ 9-14. Jury sworn; judge decides competency.—The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be sworn. The petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror is withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors. The judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions. (1790, c. 321, P. R.; 1822, c. 1133, s. 1, P. R.; R. C., c. 31, s. 34; Code, s. 405; Rev., s. 1966; C. S., s. 2324.)

Cross References.—As to oaths, see Chapter 11. As to peremptory challenges in civil cases, see §§ 9-22 and 9-23. As to peremptory challenges in criminal cases, see §§ 15-163, 15-164.

Challenges for Cause.—The causes of challenge to the juror are so numerous as to be described by Lord Coke as "infinite." It has been held in many cases that the right is given to afford a litigant fair opportunity to remove objectionable jurors, and was not intended to enable him to select

a jury of his own choosing. See *Blevins v. Mills*, 150 N. C. 493, 64 S. E. 428 (1909). A few of the most common grounds for challenge will be set out. Chief of these, perhaps, is expression of opinion. This is sometimes ground for challenge, but is not if the juror states that the opinion could be eliminated and a fair and impartial verdict rendered. *State v. Bailey*, 179 N. C. 724, 102 S. E. 406 (1920); *State v. Winder*, 183 N. C. 776, 111 S. E. 530 (1922). The challenge for this cause can be made only by

that party against whom the opinion was formed and expressed. *State v. Benton*, 19 N. C. 196 (1836).

A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself. *State v. Benton*, 19 N. C. 196 (1836); *State v. Mills*, 91 N. C. 581 (1884).

Other grounds for challenge, briefly enumerated, are relation within the ninth degree of affinity (*State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1888)); opposition to capital punishment (*State v. Vick*, 132 N. C. 995, 43 S. E. 626 (1903)); nonresidence (*State v. Bullock*, 63 N. C. 570 (1869); *State v. Upton*, 170 N. C. 769, 87 S. E. 328 (1915)); employment by party (*Oliphant v. Ry. Co.*, 171 N. C. 303, 88 S. E. 425 (1916)). But in an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant. *State v. Sultan*, 142 N. C. 569, 54 S. E. 84 (1906).

Time of Challenge.—The court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is impaneled. *State v. Green*, 95 N. C. 611 (1886).

Excusing Unchallenged Juror.—The trial judge may excuse a juror, before the jury is impaneled, although the solicitor has passed him to the prisoner and has not

challenged him for cause. *State v. Vick*, 132 N. C. 995, 43 S. E. 626 (1903).

Method of Taking Advantage of Error.

—The action of a trial judge in determining the qualifications of a jurymen, if erroneous, is ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant cannot be allowed to take advantage of the alleged error after trial and judgment. *State v. Moore*, 120 N. C. 570, 26 S. E. 697 (1897).

Review.—The rulings of the judge on questions as to the competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. *State v. DeGraffenreid*, 224 N. C. 517, 31 S. E. (2d) 523 (1944); *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686 (1947); *State v. Suddreth*, 230 N. C. 239, 52 S. E. (2d) 924 (1949).

A juror during homicide trial had sister of deceased as one of his passengers in a four mile automobile trip. Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. It was held that exception to refusal of motion was not reviewable. *State v. Suddreth*, 230 N. C. 239, 52 S. E. (2d) 924 (1949).

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race or color, are conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presents no reviewable question of law. *State v. Reid*, 230 N. C. 561, 53 S. E. (2d) 849 (1949).

§ 9-15. Questioning jurors without challenge.—The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury to make inquiry as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged. (1913, c. 31, s. 6; C. S., s. 2325.)

§ 9-16. Causes of challenge to juror drawn from box.—It shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder or has served upon the jury within two years prior to the court at which the case is tried or has not paid the taxes assessed against him during the preceding two years. In other respects the cause of challenge shall be the same as now provided by law, and nothing herein shall modify any law authorizing jurors to be summoned from counties other than the county of trial. (1913, c. 31, ss. 5, 7; C. S., s. 2326; 1933, c. 130.)

Editor's Note.—Public Laws 1933, c. 130, inserted, at the end of the first sentence of this section, the clause "or has not paid the taxes assessed against him during the preceding two years."

See 11 N. C. Law Rev. 218, for discus-

sion as to effect of the 1933 amendment to this section.

Cited in *State v. Lord*, 225 N. C. 354, 34

S. E. (2d) 205 (1945); *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.—When a jury, impaneled to try any cause, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of the court.

It shall be within the discretion of the presiding judge of the superior court, in the trial of any capital felony or other criminal case, to permit the jurors to be separated while the jury has under consideration such case. In the event the jury is composed of men and women, the court may, in its discretion, appoint more than one officer to have charge of the jury and one of such officers may be a man and the other officer a woman; and the court may, in its discretion, permit the members of the jury of opposite sexes to be provided separate rooming accommodations when not actually engaged in deliberations as jurors and pending the bringing in of a verdict in such cases. (1876-7, c. 173; Code, s. 1736; 1889, c. 44; Rev., s. 1978; C. S., s. 2327; 1947, c. 1007, s. 2.)

Editor's Note.—The 1947 amendment added the second paragraph. For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

Effect on Verdict of Refusal to Furnish Refreshments.—Where a jury retired at 11 a. m., to consider their verdict, which

was returned at 3 p. m. such verdict cannot be impeached because the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. *Gaither v. Generator Co.*, 121 N. C. 384, 28 S. E. 546 (1897).

§ 9-18. Exemption from civil arrest.—No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged. (1779, c. 157, s. 10, P. R.; R. C., c. 31, s. 31; Code, s. 1735; Rev., s. 1979; C. S., s. 2328.)

Section Does Not Repeal Common-Law Exemption.—This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attend-

ance in court either as witnesses or as suitors. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947 (1898). See also, *Greenleaf v. Peoples Bank*, 133 N. C. 292, 45 S. E. 638 (1903).

§ 9-19. Exemptions from jury duty.—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a State hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina State guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-Confederate soldier in their county from jury duty who shall apply to them for exemption.

The clerk of the superior court of each county is hereby empowered to excuse from jury duty any person or persons exempt under the first sentence of this sec-

tion prior to the convening of the term of court for which such person or persons are required to serve as jurors.

When any woman is summoned to serve on any regular or tales jury, she or her husband may appear before the clerk of the superior court and certify that she desires to be excused from jury service for one of the following causes: (1) that she is ill and unable to serve; (2) that she is required to care for her children who may be under twelve years of age; (3) that some member of her family is ill which requires her presence and attention; whereupon the clerk in his discretion may excuse her from jury service and so notify the judge of the superior court upon convening the court. (Code, ss. 1723, 2269; 1885, c. 289; 1889, c. 255; 1897, c. 32; 1901, c. 118; Rev., s. 1980; 1909, cc. 333, 868; 1913, c. 38, s. 1; 1913, c. 103; 1915, cc. 217, 228, 260; 1917, c. 200, s. 89; C. S., ss. 2329, 6870; 1931, c. 410; 1937, c. 151; 1937, c. 224, s. 2; 1943, c. 343; 1945, c. 290, s. 2; 1947, c. 1007, s. 3; 1951, c. 80.)

Local Modification. — Onslow: 1949, c. 696.

Editor's Note.—The 1931 amendment inserted "brakemen" in the first paragraph.

The first 1937 amendment added the third paragraph. And the second 1937 amendment made the section applicable to the officers reserve corps, the enlisted reserve corps and the naval reserves.

The 1943 amendment made the section applicable to radio broadcast technicians, announcers and optometrists.

The 1945 amendment inserted in the first paragraph the words "North Carolina State guard and members of the civil

air patrol."

The 1947 amendment added the fourth paragraph and inserted in the first paragraph the words "registered or practical nurses in active practice and practicing attorneys at law." For discussion of amendment, see 25 N. C. Law Rev. 334, 445.

The 1951 amendment struck out the former second sentence of the first paragraph.

Exemption Not a Contract.—Exemption from jury duty is not a contract, but a mere privilege, and may be revoked by the legislature at any time. *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820 (1906).

§ 9-20. Clerk to keep record of jurors.—The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talesmen who serve in his court, with the term at which they serve. (1893, c. 52, s. 3; Rev., s. 1981; C. S., s. 2330.)

§ 9-21. Extra or alternate juror or jurors; challenges; compensation and duties.—In the trial in the superior court of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, in the discretion and upon the direction of the judge after the jury has been duly impaneled and sworn, one or more additional or alternate jurors shall be selected in the same manner as the regular jurors in said case were selected, but each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to such unused or unexpended challenges as each party may have left after the selection of the regular trial panel of jurors in the case; such additional or alternate juror or jurors shall likewise be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury and, when the jurors are ordered kept together in any case, said alternate juror or jurors shall be kept with them. Such additional or alternate juror or jurors shall be liable to the same extent as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as hereinafter provided shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror or jurors become incapacitated or disqualified, or by reason of illness or death in the family of such juror or jurors, or other sufficient reason in the opinion of the court, such juror or jurors may be discharged by the judge, in which case, or if a juror or jurors die, upon the order of the judge said additional or alternate juror or jurors shall become a part of the jury in the order in which said juror or jurors were

selected and serve in all respects as those selected as an original juror. (1931, c. 103; 1939, c. 35; 1951, c. 82; 1951, c. 1043.)

Editor's Note.—In 9 N. C. Law Rev. 378, this statute and its background are discussed.

The 1939 amendment inserted in the last sentence the words "or by reason of illness or death in his family, or other sufficient reason in the opinion of the court."

The 1951 amendments rewrote this section and changed the words "his family" in the above quotation to read "the family of such juror or jurors."

Constitutional.—The essential attributes of trial by jury guaranteed by Art. I, § 13, are the number of jurors, their impartiality

and a unanimous verdict, and this section does not infringe upon same, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of twelve good and lawful men. *State v. Dalton*, 206 N. C. 507, 174 S. E. 422 (1934).

Applied in *State v. Broom*, 222 N. C. 324, 22 S. E. (2d) 926 (1942); *State v. Stanley*, 227 N. C. 650, 44 S. E. (2d) 196 (1947).

ARTICLE 3.

Peremptory Challenges in Civil Cases.

§ 9-22. Six peremptory challenges on each side.—The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily six jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court. (1796, c. 452, s. 2, P. R.; 1812, c. 833, P. R.; R. C., c. 31, s. 35; Code, s. 406; Rev., s. 1964; C. S., s. 2331; 1935, c. 475, s. 1.)

Cross References.—As to challenge of alternate juror, see § 9-21. As to peremptory challenges in a criminal case, see §§ 15-163 and 15-164.

Editor's Note.—By the 1935 amendment the number of peremptory challenges was increased from four to six.

In General.—As in the case of challenges for cause, the right is given to challenge but such right does not constitute the right to select jurors. *Ives v. Railroad*, 142 N. C. 131, 55 S. E. 74 (1906); *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24 (1907).

Reasons for Challenge Need Not Be Given.—A party's reason for peremp-

torily challenging can not be inquired into. *Dupree v. Ins. Co.*, 92 N. C. 418 (1885).

More Parties than One.—Whether there are one or more plaintiffs or defendants, only four (now six) peremptory challenges to the jury on either side are allowable. *Bryan v. Harrison*, 76 N. C. 360 (1877).

After Acceptance.—Where a juror has been accepted it is error to permit a peremptory challenge. *Dunn v. Railroad*, 141 N. C. 446, 42 S. E. 862 (1906).

Cited in *Ramsey v. Carolina-Tennessee Power Co.*, 195 N. C. 788, 143 S. E. 861 (1928).

§ 9-23. Where several defendants; challenges apportioned; discretion of judge.—When there are two or more defendants in a civil action the judge presiding at the trial, if it appears to the court that there are divers and antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law to defendants, or he may increase the number of challenges to not exceeding four to each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final. (1905, c. 357; Rev., s. 1965; C. S., s. 2332.)

Cited in *Ramsey v. Carolina-Tennessee Power Co.*, 195 N. C. 788, 143 S. E. 861 (1928).

ARTICLE 4.

Grand Jurors.

§ 9-24. **How grand jury drawn.**—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court. (1779, c. 157, s. 11, P. R.; R. C., c. 31, s. 33; Code, s. 404; Rev., s. 1969; C. S., s. 2333.)

Twelve Jurors Sufficient.—Eighteen jurors are not necessary to the finding of an indictment, but twelve are sufficient in North Carolina as at common law. *State v. Stewart*, 189 N. C. 340, 127 S. E. 260 (1925).

Wilson County.—Chapter 189, Public-Local Laws 1937, providing that the board of county commissioners of Wilson

County shall select grand juries in the county "in the manner prescribed by law," merely empowers the board to draw grand juries in the manner prescribed by this section, and the act is a valid exercise of legislative power. *State v. Peacock*, 220 N. C. 63, 16 S. E. (2d) 452 (1941).

Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733 (1930).

§ 9-25. **Grand juries in certain counties.**—At the first fall and spring terms of the criminal courts held for the counties of Columbus, Craven, Cumberland, Durham, Gaston, Guilford, Iredell, Johnston, Lenoir, McDowell, Mecklenburg, Moore, Nash, New Hanover, Pitt, Richmond, Vance, Wake and Wayne, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively. In the event of vacancies occurring in the grand jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell and New Hanover counties may call said grand jury to assemble and may deliver unto said grand jury an additional charge. The said judge presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell or New Hanover counties may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the grand jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of criminal causes in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year.

The first nine members of the grand jury chosen at the first term of the superior court of McDowell County for the trial of criminal cases after January first, one thousand nine hundred and forty-three, shall serve for one year and until their successors are chosen and qualified, and at the first of such courts of the fall and spring terms thereafter nine additional jurors shall be chosen to serve for one year and until their successors are chosen and qualified.

At any time the judge of the superior court presiding over the criminal court of Columbus County may call said grand jury to assemble and may deliver unto said jury an additional charge. The said judge presiding over the criminal court of Columbus County may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said fall and spring term.

Every grand juror drawn and summoned in Robeson County shall serve for a period of twelve months.

At the spring term of the criminal court held for the county of Gates, and for the county of Henderson, grand jury shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve for twelve (12) months: Provided, that at any time the judge of the superior court presiding over the criminal courts of Gates County or Henderson County may call said jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over the criminal courts of Gates County and of Henderson County may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said twelve (12) months: Provided, further, that the first nine members of the grand jury chosen at the fall term of the superior court of Gates County for the trial of criminal cases in the year one thousand nine hundred and forty-three shall serve during the fall and spring terms, and at the spring and fall terms thereafter, nine additional jurors shall be chosen to serve for one year.

At the April term of superior court held for the county of Hoke a grand jury shall be drawn, the presiding judge shall charge it as provided by law, and it shall serve until the following April term, Hoke superior court: Provided, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge: Provided further, that the judge of the superior court presiding over either criminal or civil court in said county may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn, which shall serve out the unfinished year.

If it should appear to the board of commissioners of Union County, thirty days before the beginning of the term of superior court that begins on the third Monday after the first Monday in March, that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, the said board of commissioners are authorized and empowered within their discretion to draw a grand jury for said term, and to give thirty days' notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. A grand jury for Union County shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection.

In the selection of a grand jury for Bertie County for the fall term of one thousand nine hundred and twenty-seven and annually thereafter, there shall be drawn and summoned forty men, in the same manner as now provided by law, from which a grand jury of eighteen shall be selected by the presiding judge of the superior court, which said grand jury shall serve for a period of one year from the time of their selection.

The persons drawn for service in the grand jury at the term at which said grand jury is selected, and who are not selected to serve on the grand jury, shall serve on the petit jury for the week of the term at which the grand jury is selected: Provided, that at other terms of the Superior Court of Bertie County, both civil and criminal, there shall be drawn and summoned, in the manner now provided by law, twenty persons from which the jury for the term of court for which they are drawn shall be selected.

At the first term of court for the trial of criminal cases in Durham County after the first day of July, one thousand nine hundred and twenty-nine, there shall be chosen a grand jury as now provided by law, and the first nine members of said grand jury chosen at said term shall serve for a term of one year, and the second nine members of said grand jury so chosen shall serve for a term of six months, and thereafter at the first regular and not special term of criminal court after the

first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

The grand jurors for Davidson County shall be drawn at the first fall and spring terms of the criminal courts held in the county of Davidson, and the judge shall charge them as provided by law, and the jurors so drawn shall serve during the remaining fall and spring terms respectively.

In the event of any vacancy occurring in the grand jury of Johnston, Wayne or Iredell county by death, removal from the county, sickness, or otherwise, the presiding judge may, in his discretion, order such vacancy, or vacancies, filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so drawn shall take the oath prescribed by law and shall fill out the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power, in his discretion, to appoint an assistant foreman of the grand jury in the counties of Johnston, Wayne and Iredell and said assistant foreman so appointed shall, in the absence or disqualification of the foreman, discharge the duties of the foreman of said grand jury.

At the first term of court for the trial of criminal cases in New Hanover County after the first day of July, one thousand nine hundred and thirty-seven, there shall be chosen a grand jury as now provided by law, and the first nine members of said jury chosen at said term shall serve for a term of one year, and the second nine members of said jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year.

At each August term of the superior court hereafter held for the county of Scotland the grand jury drawn as now provided by law shall be charged by the presiding judge as provided by law, and said grand jury shall serve until the next succeeding March term of the Superior Court for Scotland County and until its successor has been drawn and has qualified; at each March term of the superior court hereafter held for the county of Scotland the grand jury drawn as now provided by law shall be charged by the presiding judge as provided by law, and said grand jury shall serve until the next succeeding August term of the Superior Court for Scotland County and until its successor has been drawn and has qualified; said grand jury shall attend every term of the superior court held in said county in which criminal cases may under the law be tried during the term of service of said grand jury and until it has been discharged; at any time the judge of the superior court presiding over either criminal, civil, or mixed terms of court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge; the judge of the superior court presiding over either criminal, civil, or mixed terms of court in said county may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn and qualified, which shall serve out the unexpired term of said grand jury so discharged; said grand jury shall be subject to call for session and service at any time by the presiding judge, the solicitor of the district, or the foreman of said grand jury.

While in session or otherwise actually engaged in the performance of their duties as members of said grand jury, the members thereof shall be paid and compensated as follows: Five dollars per day shall be paid the foreman and four dollars per day shall be paid to other members of said grand jury.

A grand jury for Cabarrus County shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection.

A grand jury for Montgomery County shall be selected at each July term of the superior court in the usual manner, which said grand jury shall serve for a period of one year from the time of their selection. In the event a vacancy or vacancies shall occur in the grand jury of Montgomery County, the resident judge

of the fifteenth judicial district or the judge holding the court of said county may, in his discretion, order a new juror or jurors drawn to take the oaths prescribed and to fill any vacancy or vacancies occurring thereon. The resident judge of the fifteenth judicial district or the presiding judge shall have the power, in his discretion, to appoint an assistant foreman of the grand jury in Montgomery County and said assistant foreman so appointed shall, in the case of death, absence, or disqualification for any reason of the foreman, discharge the duties of the foreman of said grand jury.

A grand jury for Rowan County shall be selected at the one thousand nine hundred thirty-seven May term of criminal court to serve until the February term of said court in one thousand nine hundred thirty-eight, and at each February term of criminal court a grand jury for Rowan County shall be selected in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of its selection: Provided, in case of removal from the county, sickness, death or other cause a juror or jurors become disqualified, the presiding judge may in his discretion select in the usual manner a juror or jurors to fill such vacancy or vacancies, which said juror or jurors selected shall fill out the unexpired term of such juror or jurors disqualified; and, provided further, the presiding judge may in his discretion at any term discharge said grand jury in whole or in part and cause another to be selected.

The first nine members of the grand jury chosen at the first term of the Superior Court of Caldwell County for the trial of criminal cases after May first, one thousand nine hundred and forty-three, shall serve for one year and until their successors are chosen and qualified, and at the first of such courts of the fall and spring terms thereafter nine additional jurors shall be chosen to serve for one year and until their successors are chosen and qualified.

A grand jury for Lincoln County shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of its selection: Provided, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge.

At the first term of court for the trial of criminal cases in Washington County after the first day of July, 1947, there shall be chosen a grand jury as now provided by law, and the first nine members of said grand jury chosen at said term shall serve for a term of one year and the second nine members of said grand jury so chosen shall serve for a term of six months, and thereafter, at the first regular and not special term of criminal court after the first days of January and July of each year there shall be chosen nine members of said grand jury to serve for a term of one year. The grand jurors shall receive compensation only for the time when actually serving.

At the first term of court for the trial of criminal cases in Haywood County after January 1, 1951, there shall be chosen a grand jury as now provided by law, and the first nine members of said jury chosen at said term shall serve for a term of one year, and the second nine members of said jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of July and January of each year there shall be chosen nine members of said grand jury to serve for a term of one year. (1913, c. 196; 1917, cc. 116, 118; 1919, cc. 113, 187; C. S., s. 2334; Ex. Sess. 1920, c. 39; 1921, cc. 18, 55, 69, 72; Ex. Sess. 1921, c. 15; 1923, cc. 11, 15, 104, 115; Ex. Sess. 1924, c. 28; 1925, c. 24; 1927, c. 78; Pub. Loc. 1927, cc. 80, 162; 1929, c. 52, ss. 1, 2; 1929, cc. 122, 133; 1931, cc. 43, 97, 130, 131, 237; 1933, cc. 29, 92, 138; 1935, cc. 5, 41; 1937, cc. 21, 77, 78, 372; 1939, c. 26; 1943, cc. 50, 51, 613; 1945, c. 535; 1947, cc. 119, 373, 641; 1951, c. 6.)

Editor's Note.—The 1945 amendment inserted the words "or McDowell" in the second sentence of the first paragraph. The first 1947 amendment added the

second and third sentences of the paragraph relating to Montgomery County. The second 1947 amendment inserted the next to last paragraph relating to Washington County. And the third 1947 amend-

ment increased the pay of the foreman and members of the grand jury in Scotland County.

The 1951 amendment added the last paragraph relating to Haywood County.

§ 9-26. Exceptions for disqualifications.—All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (Code, s. 1741; Rev., s. 1970; 1907, c. 36, s. 1; C. S., s. 2335.)

Grand Jury of Twelve Men.—An indictment found by a grand jury of twelve men is good, provided all of the twelve concur in finding the bill. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384 (1898).

Duty of Grand Jurors.—It is not only the right but it is the duty of grand jurors, of their own motion, to originate prosecutions by making presentments of all violations of law which have come under the personal observation or knowledge of each juror, or of which they have credible information. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453 (1889).

A party litigant does not have the right to select jurors, but only to challenge or reject them. *State v. Peacock*, 220 N. C. 63, 16 S. E. (2d) 452 (1941).

Grand Juror also Member of Petit Jury.—The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror. *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453 (1889).

Grand Juror Having Suit Pending.—The fact that one of the grand jurors who found a true bill had at that time a suit pending and at issue in the same court is sufficient ground to support a motion to quash the indictment, if the motion is made in apt time. *State v. Gardner*, 104 N. C. 739, 10 S. E. 146 (1889).

Son of Prosecutor Member of Grand Jury.—The fact that the son of the prosecutor, in an indictment for larceny, was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground. *State v. Sharp*, 110 N. C. 604, 14 S. E. 504 (1892).

Absence of Negroes from Grand Jury.—It is no ground to quash an indictment

because it was found by a grand jury drawn from a venire in which there were no colored freeholders. The jury list, as constituted by the county court in accordance with the law in force at the time of its constitution, did not contain the names of such colored freeholders. *State v. Taylor*, 61 N. C. 508 (1868). See also *State v. Daniels*, 134 N. C. 641, 46 S. E. 743 (1904).

The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitution of the United States. *State v. Peoples*, 131 N. C. 784, 42 S. E. 814 (1902).

As to arbitrary exclusion of negroes from grand jury, see *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537 (1948).

Indictment Not Quashed for Failure to Pay Taxes.—Formerly, it was discretionary with the trial judge to allow or refuse a motion to quash because a grand juror had not paid his taxes after entry of plea until the petit jury was sworn and impaneled, and a motion to quash after entry of plea was made too late as a matter of right. This is changed by the amendment of 1907 adding the last sentence of this section. *State v. Banner*, 149 N. C. 519, 63 S. E. 84 (1908).

The passage of the amendment immediately following the decision in the case of *Breese v. United States*, 143 F. 250 (1906), was evidently for the purpose of removing the disqualification of grand jurors, based upon failure to pay taxes for the preceding year, in cases where they actually serve upon the grand jury and pass upon bills of indictment; and there is no reason why it should not be given this interpretation. *Davis v. United States*, 49 F. (2d) 269 (1931).

Members of Grand Jury Summoned by Mistake.—While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is

illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake. *State v. Paramore*, 146 N. C. 604, 60 S. E. 502 (1908).

When Competency of Grand Jury Excepted to.—Matters which go to the incompetency of a grand jury may be excepted to after the bill is found, if it is done at the earliest opportunity afterwards, which clearly is upon the arraignment, when the defendant is first called upon to answer. *State v. Griffice*, 74 N. C. 316 (1876).

§ 9-27. Foreman may administer oaths to witnesses.—The foreman of every grand jury duly sworn and impaneled in any of the courts has power to administer oaths and affirmations to persons to be examined before it as witnesses: Provided, that the said foreman shall not administer such oath or affirmation to any person except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the State, or by direction of the court. The foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury. In case of the absence of the foreman, or in case of his inability to serve, the presiding judge shall appoint an acting foreman, who shall have all powers vested by law in the foreman. (1879, c. 12; Code, s. 1742; Rev., s. 1971; C. S., s. 2336; 1929, c. 228.)

Editor's Note.—The 1929 amendment added the last sentence.

Section Not Exclusive.—This section, authorizing the foreman of the grand jury to swear witnesses to be examined before the jury, is directory merely. The fact that witnesses are sworn by the clerk of court rather than by the foreman is not grounds for arresting judgment or quashing an indictment. *State v. Allen*, 83 N. C. 680 (1880); *State v. White*, 88 N. C. 698 (1883).

Section Directory Merely.—The provision of the section, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, is directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. *State v. Hines*, 84 N. C. 810 (1881). See *State v. Avant*, 202 N. C. 680, 163 S. E. 806 (1932); *State v. Lancaster*, 210 N. C. 584, 187 S. E. 802 (1936).

This section requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the

A motion to quash an indictment, made upon arraignment and before pleading, for that the grand jury was improperly constituted, is in apt time. *State v. Paramore*, 146 N. C. 604, 60 S. E. 502 (1908).

Qualifications Judged at Time of Service.—The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384 (1898).

Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733 (1930).

names of the witnesses sworn and examined before the jury is directory, and the fact that it does not appear by indorsement on a bill that the witness had been sworn and examined is no ground for quashing the indictment or arresting the judgment. *State v. Hollingsworth*, 100 N. C. 535, 6 S. E. 417 (1888).

No Indorsement Necessary.—No indorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. *State v. Sultan*, 142 N. C. 569, 54 S. E. 841 (1906), overruling *State v. McBroom*, 127 N. C. 528, 37 S. E. 193 (1900).

Witnesses Not Re-Examined.—Where an indictment upon which witnesses had been examined was returned by the grand jury "a true bill," and quashed because it did not sufficiently charge the offense intended, and thereupon a new bill for the offense was sent and returned into court, "a true bill," without a re-examination of the witnesses, this bill should be quashed. *State v. Ivey*, 100 N. C. 539, 5 S. E. 407 (1888).

§ 9-28. Grand jury to visit jail and county home.—Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

It shall not be necessary for any grand jury in any county to make any inspections or submit any reports with respect to any county offices or agencies other than those required by the first paragraph of this section, nor for any judge of the superior court to charge the grand jury with respect thereto. (1816, c. 911, s. 3, P. R.; R. C., c. 30, s. 3; Code, s. 785; Rev., s. 1972; C. S., s. 2337; 1949, c. 208.)

Editor's Note.—The 1949 amendment added the second paragraph.

ARTICLE 5.

Special Venire.

§ 9-29. Special venire to sheriff in capital cases.—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned. (1830, c. 27; R. C., c. 35, s. 30; Code, s. 1738; Rev., s. 1973; 1913, c. 31, s. 1; C. S., s. 2338.)

Cross Reference.—As to penalty on sheriff who fails to execute writ, see § 9-31.

Discretion of Judge.—It is in the discretion of the trial judge to order a special venire in capital cases and determine its number, which he may likewise change by another order. *State v. Brogden*, 111 N. C. 656, 16 S. E. 170 (1892).

The trial judge has the discretionary power to issue a writ of venire facias, instead of directing the jurors to be drawn from the jury box, and the court's action in issuing the writ is not reviewable in the absence of abuse of discretion. *State v. Casey*, 212 N. C. 352, 193 S. E. 411 (1937).

An objection by a prisoner charged with capital offense, that the special venire was summoned by the sheriff as prescribed by this section instead of being drawn from the jury box as prescribed by § 9-30, is untenable since the latter method is purely discretionary. *State v. Smarr*, 121 N. C. 669, 28 S. E. 549 (1897).

A motion for a special venire, both as a matter of practice and under this section and § 9-30, is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion. *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469 (1948).

The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under this section, or drawn from the box under § 9-30, are both discretionary with the judge of the superior court, and unless an objec-

tion goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array, unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. *State v. Levy*, 187 N. C. 581, 122 S. E. 386 (1924).

Freeholders.—An order for a special venire properly specifies that the veniremen are to be freeholders. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Juror May Have Served within Two Years.—A juror summoned on a special venire is not rendered incompetent because he has served on the jury in the same court within two years. Only tales jurors come within the proviso of § 9-11 and, in order that they may be disqualified, it must appear that they have not only been summoned, but have acted as jurors within that time. *State v. Whitfield*, 92 N. C. 831 (1885).

Special Venire Selected without Partiality.—A challenge to the array on the ground that the sheriff and his deputies, under instructions by the sheriff, selected for the special venire freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, is properly refused, the instructions of the sheriff being in compliance with this section, and the action of the sheriff and the deputies showing no partiality, misconduct and irregularity in making out the list. *State v. Dixon*, 215 N. C. 438, 2 S. E. (2d) 371 (1939).

Special Venire Selected without Regard

to Color.—It is no ground of exception that a special venire was selected from the freeholders of the county without regard to color, no reference having been had to the jury list constituted by the county court. *State v. Taylor*, 61 N. C. 508 (1868).

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Order Substantially a Special Writ of Venire Facias.—A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a spe-

cial writ of venire facias. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Accessory May Be Tried by Special Venire.—Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. *State v. Register*, 133 N. C. 746, 46 S. E. 21 (1903).

Challenge for Cause.—Under this section where a special venire has been ordered by the court for the trial of a capital felony, the veniremen, being selected by the sheriff in his discretion, not from the jury box, are subject to the same challenges for cause as tales jurors. *State v. Avant*, 202 N. C. 680, 163 S. E. 806 (1932).

Cited in *State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205 (1945).

§ 9-30. Drawn from jury box in court by judge's order.—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken. (Code, s. 1739; 1897, c. 364; Rev., s. 1974; 1913, c. 31, s. 2; C. S., s. 2339.)

Cross Reference.—As to qualification of jurors, see § 9-1 and annotations thereto. See 11 N. C. Law Rev. 219.

Editor's Note.—Formerly special veniremen were required to be freeholders, but in 1913 this requirement was omitted.

For cases decided under the former rule, see *State v. Kilgore*, 93 N. C. 533 (1885); *State v. Moore*, 120 N. C. 565, 26 S. E. 629 (1897). See also, *State v. Freeman*, 100 N. C. 429, 5 S. E. 921 (1888).

Method of Drawing Directory.—The regulations as to drawing a special venire may be directory, but they should be strictly observed. However, failure to follow the directions of the statute will not invalidate the panel in the absence of bad faith or other adequate cause. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830 (1903).

The practice of drawing the venire from the box is commended. *State v. Brogden*, 111 N. C. 656, 16 S. E. 170 (1892).

The drawing of the jury from the box is

authorized by this section, and is favored by the courts, though the requirement is not mandatory. *State v. Whitson*, 111 N. C. 695, 16 S. E. 332 (1892).

Discretion of Judge.—See notes to § 9-29.

How Jurors Drawn.—On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the tales jurors are put in and drawn; and the jurors summoned under a special venire facias are in this respect to be regarded as talesmen. *State v. Benton*, 19 N. C. 196 (1836).

Special Venire Exhausted.—When a special venire is exhausted without completing the jury, the court may order a further venire to be summoned at once from the bystanders. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536 (1896).

Matters Affecting Entire Panel.—In the absence of any allegation that the sheriff

acted corruptly or with partiality in summoning the venire, or that anything had been done affecting "the integrity and fairness of the entire panel," it is not a ground of challenge to the array that the sheriff failed to summon several of the special venire, drawn from the jury box or that the jury box was not revised by the county commissioners. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536 (1896).

The integrity and fairness of the entire panel of jurors summoned in obedience to a writ of special venire are not affected by the fact that one man named in the writ had removed from the county and

that another named therein was dead when the jury list was revised by the commissioners. Neither are they affected by the fact that one of those named on the venire was not summoned, nor by the fact that the sheriff in copying the list of the venire furnished him omitted, by mistake, the name of one who in consequence was not summoned. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715 (1893).

· **Applied** in *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469 (1948), treated under § 9-29.

Cited in *State v. Lord*, 225 N. C. 354, 24 S. E. (2d) 205 (1945).

§ 9-31. Penalty on sheriff not executing writ or jurors not attending.

—If any sheriff fails duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars. All jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors. (1830, c. 27, s. 2; R. C., c. 35, s. 31; Code, s. 1740; Rev., ss. 1975, 3602; C. S., s. 2340.)

Cross Reference.—As to rules and penalties prescribed for other jurors, see § 9-10 et seq.

Amendment of Return on Writ.—Where a sheriff, in making his return on a writ and list of special venire, endorsed thereon, "Received October 15, 1893, executed October 30, 1893, by summoning one hundred and fifty men," it was within the

discretion of the court, at the term to which the writ was returnable, to permit an amendment of the return so as to show those of the list furnished him by the clerk who were actually summoned, and those not summoned, with the reasons why they were not. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715 (1893).

Chapter 10.

Notaries.

Sec.	Sec.
10-1. Appointment and commission; term of office; revocation of commission.	10-7. Expiration of commission to be stated after signature.
10-2. To qualify before clerk; record of qualification.	10-8. Fees of notaries.
10-3. Clerks notaries ex officio; may certify own seals.	10-9. Notarial seal.
10-4. Powers of notaries public.	10-10. Acts of minor notaries validated.
10-5. [Repealed.]	10-11. Acts of certain notaries prior to qualification validated.
10-6. May exercise powers in any county.	10-12. Acts of notaries public in certain instances validated.

§ 10-1. Appointment and commission; term of office; revocation of commission.—The Governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public, and shall issue to each a commission. They shall hold their office for two years from and after the date of their appointment.

Any commission so issued by the Governor or his predecessor, shall be revokable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission.

Whenever the Governor shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the clerk of the court in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Governor, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3172; 1927, c. 117.)

Cross References. — As to validating acknowledgments before notaries under age, see § 10-10. As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

Editor's Note.—The Supreme Court, by a three to two decision, with Chief Justice Clark dissenting, held in *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915), that women could not hold the position of notary public in North Carolina. The legislature had, at its previous session, enacted Chapter 12, Laws 1915, as follows: "The Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed to be a place of trust and profit, and not an office." The Governor, acting upon this authority, issued his commission to Mrs. Noland Knight as a notary public. Thereafter a quo warranto proceeding was brought, averring that a notary public was not a place of trust and profit, as the legislature has enacted, but was in truth an office, and therefore that the commission

issued to her by the Chief Executive was a nullity because she was a woman. The action was brought before his Honor Judge Webb of the superior court who declined to hold the commission void. The Supreme Court reversed the decision and held the act unconstitutional on the grounds that a notary public was a public office; that a woman was ineligible for public office under the Constitution; and that being a public office, that the legislature could not change its character by simply making a change in its name. This was so held in spite of the fact that, as pointed out by Chief Justice Clark, there was no constitutional provision as to notaries public, and that the place was wholly a creature of legislative enactment.

However correct or incorrect may have been the conclusion of the court in *State v. Knight*, supra, by the very reasoning in that case, women are now eligible as notaries public. Federal and State constitutional amendments now insure to women the right to the ballot on equal terms with men. Article VI, § 7, of the Constitution

of North Carolina is as follows: "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office," etc. Women are not included within the exceptions numbered. See *Lee v. Dunn*, 73 N. C. 595 (1875); *Spruill v. Bate-man*, 162 N. C. 588, 77 S. E. 768 (1913). Therefore, since women can vote, and voters may hold office, and the position of notary public is a public office, it follows that women are eligible to the office of notary public.

Origin.—The office of notary public has long been known both to the civil and to the common law. *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

In *Loan Co. v. Turrell*, 19 Ind. 469, it was said: "The office originated in the early Roman jurisprudence, and was known in England before the Conquest." *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

Present Status.—The office of notary public is in most of the states a state

office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope. *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

Who Eligible.—It has been said that "at common law a minor is eligible to the position of notary public." *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

Same—In Virginia.—In Virginia, which naturally more nearly follows the English law than any other state in the Union, its attorney general says: "In this state any man or woman over 18 years of age can be a notary public." *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

Same—English Rule as to Women.—Sir John Simon, when attorney general of England, said: "No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed." *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

§ 10-2. To qualify before clerk; record of qualification.—Upon exhibiting their commissions to the clerk of the superior court of the county in which they are to act, the notaries shall be duly qualified by taking before said clerk an oath of office, and the oaths prescribed for officers. A certificate of the commission shall be deposited with the clerk and filed among the records, and he shall note on his minutes the qualification of the notary public. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3173.)

Cross References.—As to the oath prescribed for officers, see § 11-11. As to when an attorney is disqualified, see § 47-8.

§ 10-3. Clerks notaries ex officio; may certify own seals.—The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts. (1833, c. 7, ss. 1, 2; R. C., c. 75, s. 3; Code, s. 3306; Rev., s. 2349; C. S., s. 3174.)

A clerk of the superior court, is, by virtue of his office, a notary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. *Lawrence v. Hodges*, 92 N. C. 672 (1885).

§ 10-4. Powers of notaries public.—(a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may—

(1) Take and certify the acknowledgment or proof of the execution or signing of any instrument or writing except a contract between a husband and wife governed by the provisions of G. S. 52-12;

(2) Take affidavits and depositions;

(3) Administer oaths and affirmations, including oaths of office, except when such power is expressly limited to some other public officer;

(4) Protest for nonacceptance, or nonpayment, notes, bills of exchange and other negotiable instruments; and

(5) Perform such acts as the law of any other jurisdiction may require of a notary public for the purposes of that jurisdiction.

(b) Any act within the scope of subsection (a) performed in another jurisdiction by a notary public of that jurisdiction has the same force and effect in this

State as fully as if such act were performed in this State by a notary public commissioned under the laws of this State.

(c) A notary public who, individually or in any fiduciary capacity, is a party to any instrument, cannot take the proof or acknowledgment of himself in such fiduciary capacity or of any other person thereto.

(d) A notary public who is a stockholder, director, officer, or employee of a corporation is not disqualified to exercise any power, which he is authorized by this section to exercise, with respect to any instrument or other matter to which such corporation is a party or in which it is interested unless he is individually a party thereto. (1866, c. 30; 1879, c. 128; Code, s. 3307; Rev., s. 2350; C. S., s. 3175; 1951, c. 1006, s. 1.)

Cross Reference.—As to the taking of affidavits to be used before a court, see § 3-8.

Editor's Note.—The 1951 amendment rewrote this section.

Scope of Powers.—A notary public is recognized by the universal law of civilized and commercial nations; but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. *Benedict, Hall & Co. v. Hall*, 76 N. C. 113 (1877).

By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law-merchant, and pertained to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. *Pipe and Foundry Co. v. Keith & Co.*, 114 N. C. 178, 19 S. E. 109 (1894).

Duty in Taking Acknowledgments. — The notary is required "to take and certify the acknowledgment or proof" and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the execution of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto. *Young v. Jackson*, 92 N. C. 144 (1885); *Darden v. Steamboat Co.*, 107 N. C. 434, 12 S. E. 46 (1890); *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

Acknowledgment Quasi Judicial Act.—An acknowledgment of a deed, taken before a notary public, is a judicial, or at least a quasi judicial, act. *Long v. Crews*, 113 N. C. 256, 18 S. E. 499 (1893).

Protest as Evidence.—The protest of a notary establishes the facts stated in it in

respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. *Pipe and Foundry Co. v. Keith & Co.*, 114 N. C. 178, 19 S. E. 109 (1894).

This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being prima facie true. *Elliott v. White*, 51 N. C. 98 (1858); *Pipe and Foundry Co. v. Keith & Co.*, 114 N. C. 178, 19 S. E. 109 (1894).

Certificate Prima Facie Evidence.—The certificate of the notary establishes prima facie that electors were sworn as required by statute when they signed the affidavits accompanying their absentee ballots. *State v. Chaplin*, 229 N. C. 797, 48 S. E. (2d) 37 (1948).

With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is prima facie evidence of the truth of its pertinent recitals. *Pipe and Foundry Co. v. Keith & Co.*, 114 N. C. 178, 19 S. E. 109 (1894).

Not Disqualified to Act because Employee of Grantee.—A notary public is not disqualified to take acknowledgment of grantors and privy examination of married women to conveyances of land when he is an employee of the grantee, without any interest in the land conveyed. *Smith v. Ayden Lumber Co.*, 144 N. C. 47, 56 S. E. 555 (1907).

Incurable Incompetency. — Where a notary public was interested in a deed of trust, he was disqualified to take the acknowledgment, his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration. *Long v. Crews*, 113 N. C. 256, 18 S. E. 499 (1893).

§ 10-5: Repealed by Session Laws 1951, c. 1006, s. 3.

§ 10-6. **May exercise powers in any county.**—Notaries public have full power and authority to perform the functions of their office in any and all counties

of the State, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done. (1891, c. 248; Rev., s. 2351; C. S., s. 3176.)

A notary public resident out of the State used in the courts of this State. Hall & Co. v. Hall, 76 N. C. 113 (1877).
has no authority to take affidavits to be

§ 10-7. Expiration of commission to be stated after signature.—Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts. (Rev., s. 2351a; C. S., s. 3177.)

Cited in Crissman v. Palmer, 225 N. C. 472, 35 S. E. (2d) 422 (1945).

§ 10-8. Fees of notaries.—Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill or any other thing necessary to be protested, and the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words. Cases of protest concerning vessels or other cargoes shall not be affected by this section. (Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; Rev., s. 2800; C. S., s. 3178.)

The fees of notaries public are created and regulated by statute. Cider & Vinegar Co. v. Carroll, 124 N. C. 555, 32 S. E. 959 (1899).

§ 10-9. Notarial seal.—Official acts by notaries public shall be attested by their notarial seals. (Rev., s. 2352; C. S., s. 3179.)

Cross Reference.—As to validation of deeds and probate and registration thereof where notarial seals have been omitted, see §§ 47-102 and 47-103.

Courts Take Judicial Notice.—It was said in Pierce v. Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. Ed. 254 (1882): "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." State v. Knight, 169 N. C. 333, 85 S. E. 418 (1915).

Name in Seal.—The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of deed by a notary public is adjudged to have been proved by

such seal and certificate, it is not rebutted by the mere fact that the notary signs his name, "Geo. Theo. Somner" and the seal has on it the name of "Theo. Somner." Deans v. Pate, 114 N. C. 194, 19 S. E. 146 (1894).

Failure to Attest by Seal.—A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal. Tucker v. Inter-States Life Association, 112 N. C. 796, 17 S. E. 532 (1893).

The acknowledgement of a deed before a notary public in due form is not defective because not attested by his notarial seal. Peel v. Corey, 196 N. C. 79, 144 S. E. 559 (1928).

§ 10-10. Acts of minor notaries validated.—All acts of notaries public for the State of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

Cross Reference.—As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

§ 10-11. Acts of certain notaries prior to qualification validated.—All acknowledgments taken and other official acts done by any person who has

heretofore been appointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby. (1945, c. 665.)

§ 10-12. Acts of notaries public in certain instances validated.—(a) The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public

(1) In taking any acknowledgment, or

(2) In notarizing any instrument, or

(3) In performing any act purportedly in the capacity of a notary public are hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts.

(b) All instruments with respect to which any such person as is described in subsection (a) of this section has purported to act in the capacity of a notary public shall have the same legal effect as if such person acting as a notary public had in fact qualified as a notary public prior to performing any acts with respect to such instruments. (1947, c. 313; 1949, c. 1.)

Editor's Note. — The 1949 amendment re-enacted this section without change.

Chapter 11.

Oaths.

Article 1.

General Provisions.

Sec.

- 11-1. Oaths to be administered with solemnity.
- 11-2. Administration of oath upon the Gospels.
- 11-3. Administration of oath with up-lifted hand.
- 11-4. Affirmation of Quakers and others.
- 11-5. Oaths of corporations.

Sec.

- 11-6. Oath to support Constitution of United States; all officers take.
- 11-7. Oath or affirmation to support State Constitution; all officers to take.
- 11-8. When deputies may administer.
- 11-9. Administration by certain officers.
- 11-10. When county surveyors may administer oaths.

Article 2.

Forms of Official and Other Oaths.

- 11-11. Oaths of sundry persons; forms.

ARTICLE 1.

General Provisions.

§ 11-1. **Oaths to be administered with solemnity.**—Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Rev., s. 2353; C. S., s. 3188.)

This "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it and of administering it. *State v. Davis*, 69 N. C. 383 (1873).

Object of Statutes.—It is manifest, by a perusal of the statutes, that they were not intended to alter any rule of law, but the sole object was to prescribe forms for the sake of convenience and uniformity. *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

Double Sanction to Oath of Witness.—The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. *Shaw v. Moore*, 49 N. C. 25 (1856).

Sufficiency of Belief.—A person who believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in this world, all violators of his law, and that the sinner will inevitably be punished in this world for each and every sin committed; but there will be no punishment after death, and that in another world all will be happy and equal to the angels is competent to be sworn. *Shaw v. Moore*, 49 N. C. 25 (1856).

In *Omychund v. Barker*, 1 Atk. 19, and

Wiles, 538, it was decided that a Gentoo, who was an infidel, who did not believe in either the Old or New Testament, but who believed in a God, as the Creator of the Universe, and that he is a rewarder of those who do well, and an avenger of those who do ill, according to the common law, may be sworn in that form which is the most sacred and obligatory upon his religious sense. The case establishes the rule to be, that an infidel is competent to be sworn, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. *Shaw v. Moore*, 49 N. C. 25 (1856).

It is laid down by Lord Hale to be the common law, that a Jew is competent to be sworn, and may be sworn on the Old Testament, and such has ever since been taken to be the law. *Shaw v. Moore*, 49 N. C. 25 (1856).

Finding of the Judge Conclusive.—The finding of the judge as to the competency of a witness to take oath is conclusive, and not reviewable. *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

At Common Law.—In *Shaw v. Moore*, 49 N. C. 25 (1856), *Pearson, J.*, said that "in the old cases it was held to be common law that no infidel (in which class Jews were included) could be sworn as a witness in the courts of England." He then

proceeds to say that the reason for this as given by Lord Coke, "to say the least of it, is narrowminded, illiberal, bigoted, and unsound." *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

Objection to Oath of Incompetent after Verdict.—Where a juror is incompetent to be sworn because an atheist (*State v. Davis*, 80 N. C. 412 (1879)) and the objection is not discovered till after verdict, setting aside the verdict rests in the discretion of the trial judge. *State v. Lambert*, 93 N. C. 618 (1885); *State v. Council*, 129 N. C. 511, 39 S. E. 814 (1901).

Objection to Manner of Administering after Verdict.—Where a juror was sworn in the presence of the prisoner, and his counsel let him acquiesce in the manner in

which the oath was taken, to object after the verdict would simply make a trial not a decision upon the merits but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. *State v. Ward*, 9 N. C. 443 (1823); *Briggs v. Byrd*, 34 N. C. 377 (1851); *State v. Patrick*, 48 N. C. 443 (1856); *State v. Boon*, 82 N. C. 638 (1880); *State v. Council*, 129 N. C. 511, 39 S. E. 814 (1901).

Failure to Administer.—In *State v. Gee*, 92 N. C. 756 (1885), where a witness was not sworn at all, the court held that this was not ground of objection after verdict. *State v. Council*, 129 N. C. 511, 39 S. E. 814 (1901).

§ 11-2. **Administration of oath upon the Gospels.**—Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Code, s. 3309; Rev., s. 2354; C. S., s. 3189; 1941, c. 11.)

Cross References.—As to exceptions to this section, see § 11-3 for administration of oath with uplifted hand, and § 11-4 for affirmation of Quakers and others. As to forms of oaths, see § 11-11. As to perjury, see § 14-209.

Editor's Note. — The 1941 amendment dispensed with the former requirement that the Holy Gospel be kissed as a part of the administration of an oath. For case relating to the requirement, see *State v. Owen*, 72 N. C. 605 (1875).

Application to Witnesses. — After this manner, every witness, except as otherwise provided, must be sworn. *State v. Davis*, 69 N. C. 383 (1873).

Sufficiency of Juror's Oath. — An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." *State v. Paylor*, 89 N. C. 539 (1883).

Ministerial Act.—The administration of an oath is a ministerial act and may be done by any one in the presence and by the direction of the court, but is the act of the court. *State v. Knight*, 84 N. C. 790 (1881).

Partially Directory.—"As to the form of the oath, when it is prescribed by statute," remarks, Mr. Bishop, "the statute is to be construed in some sense directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking

it from the pains of perjury." 2 Bish. Cr. Law, §§ 862, 982; *State v. Mazon*, 90 N. C. 676 (1884).

Same—Validity of Irregular Oath.—To hold invalid an oath that did not follow the very words of the statute might prove disastrous to the public interests. *State v. Mazon*, 90 N. C. 676 (1884).

Same—Same—Juror's Oath in Capital Cases. — Although the omission of the words "you swear" at the commencement of the oath of jurors in a capital case looks awkward and mars the comeliness of judicial proceedings, we do not think that it vitiates the oath. *State v. Owen*, 72 N. C. 605 (1875).

The manner of swearing is, as Judge Pearson says, merely a form "adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity." *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

Presumption.—The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. *State v. Mace*, 86 N. C. 668 (1882).

The maxim omnia presumuntur rite esse acta applies in no case with greater effect than to official acts of this nature, the minute and particular details of which, while

important, are not likely to attract such attention as to insure their being accurately remembered. *State v. Mace*, 86 N. C. 668 (1882).

Willful Violation.—A willful violation of such an oath in a material matter is perjury, and no other is. This is the general rule. *State v. Davis*, 69 N. C. 383 (1873).

When Deputy Clerk May Administer.—The deputy of the clerk of the superior

court is authorized to take the affidavit of the plaintiff in an action of claim and delivery. *Jackson v. Buchanan*, 89 N. C. 74 (1883).

A deputy sheriff is not authorized to administer oath to homestead appraisers. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457 (1900).

Cited in *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930).

§ 11-3. Administration of oath with uplifted hand.—When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be). (1777, c. 108, s. 3, P. R.; R. C., c. 76, s. 2; Code, s. 3310; Rev., s. 2355; C. S., s. 3190.)

Cross References.—As to forms of oaths, see § 11-11. As to oath required of voter, see § 163-29.

Conscientious Scruples. — If the usual form of oaths upon the Holy Evangelists is dispensed with and an “appeal” or “affirmation” is substituted, it must appear that the person sworn had conscientious scruples, else the “appeal” or “affirmation” is invalid. *State v. Davis*, 69 N. C. 383 (1873); *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475 (1898).

Presumption as to Manner. — Where it appears that the registrar administered the prescribed oath to electors, but that he did not swear them on the Bible, it will be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by the section, and was accepted as a valid mode of adminis-

tering it, by both the registrar and the elector. Administering the oath in such manner is sufficient to meet the requirements of the election law. *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545 (1889).

Presumption as to Witness. — When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. *State v. Whisenhurst*, 9 N. C. 458 (1823).

Cited in *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930).

§ 11-4. Affirmation of Quakers and others.—The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the Constitution of the State, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word “swear”; which affirmation shall be effectual to all intents and purposes. (1777, c. 108, s. 4, P. R.; 1777, c. 115, s. 42, P. R.; 1819, c. 1019, P. R.; 1821, c. 1112, P. R.; R. C., c. 76, s. 3; Code, s. 3311; Rev., s. 2356; C. S., s. 3191.)

In General.—Quakers and some others who have conscientious scruples about swearing at all, are permitted to “affirm.”

State v. Davis, 69 N. C. 383 (1873).

Cited in *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930).

§ 11-5. Oaths of corporations.—In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corpo-

ration by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2; C. S., s. 3192.)

Cross Reference.—As to verification of pleadings by corporations, see § 1-147.

§ 11-6. Oath to support Constitution of United States; all officers take.—All members of the General Assembly, and all officers who shall be elected or appointed to any office of trust or profit within the State, shall, agreeably to act of Congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States; so help me, God.

Which oath shall be taken before they enter upon the execution of the duties of the office. (1791, c. 342, s. 2, P. R.; R. C., c. 76, s. 5; Code, s. 3313; Rev., s. 2357; C. S., s. 3193.)

Cross References. — As to what constitutes an office or place of trust or profit within the meaning of this section, see §§ 128-1, 128-13. See also, Const., Art. VI, § 7, for oaths required of public officers.

Officers and Placemen.—Officers are required to take an oath to support the Constitutions of the State and of the United States, while placemen are not. *Worthy v. Barrett*, 63 N. C. 199 (1869).

Oath Incidental.—The oath required of public officers is merely incidental to and constitutes no part of the office. *State v. Stanley*, 66 N. C. 60 (1872).

Failure to Take Oath. — Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. *Wiley v. Worth*, 61 N. C. 171 (1867).

§ 11-7. Oath or affirmation to support State Constitution; all officers to take.—Every member of the General Assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the Constitution of the State and Constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the State, by any means, in any conspiracy whatever, against the State; that I will disclose and make known to the legislative, executive or judicial powers of the State all treasonable conspiracies which I shall know to be made or intended against the State. (1781, c. 342, s. 1, P. R.; R. C., c. 76, s. 4; Code, s. 3312; Rev., s. 2358; C. S., s. 3194.)

Cross References.—As to oath with uplifted hand, see § 11-3. As to affirmation by Quakers and others, see § 11-4. As to public officers, see § 11-6 and Const., Art. VI, § 7.

§ 11-8. When deputies may administer.—In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to

administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (1836, c. 27, s. 2; R. C., c. 76, s. 7; Code, s. 3316; Rev., s. 2359; C. S., s. 3195.)

Cross References.—As to administration and annotations. See also, annotations to of homestead appraiser's oath, see § 1-371 § 11-2.

§ 11-9. Administration by certain officers.—The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (1889, c. 529; 1899, c. 89; Rev., s. 2362; C. S., s. 3196.)

Cross Reference.—As to power of sheriff to administer oath to homestead appraisers, see § 1-371.

§ 11-10. When county surveyors may administer oaths.—The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants. (1881, c. 144; Code, s. 3314; Rev., s. 2361; C. S., s. 3197.)

ARTICLE 2.

Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.—The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of Attorney General (solicitor for the State or attorney for the State in the county of); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will give, to any person whatsoever, any gratuity, gift, fee or reward, in consideration of my appointment to the office of clerk of the Supreme Court of North Carolina; nor have I sold or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in this State; I do further swear that I will execute the office of clerk of the Supreme Court without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State; and I do further swear that I will execute the office of clerk of the superior court for the county of without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of, in the county of, according to law; so help me, God.

Constable

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of constable; I will see and cause the peace of the State to be well and truly preserved and kept, according to my power; I will arrest all such persons as, in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

Cotton Weigher for Public

I,, public weigher for the city of (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unrepresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Jury, in a Capital Case

You swear (or affirm) that you will well and truly try, and true deliverance make, between the State and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you, God.

Jury, in Criminal Actions Not Capital

You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term".)

Jury, in Civil Actions

You and each of you swear (or affirm) that you will well and truly try all

civil actions which shall come before you during this term, and true verdicts give according to the evidence; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term".)

Jury, Laying Off Dower

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D. as by law she is entitled to; so help you, God.

Judge of the Supreme Court

I, A. B., do solemnly swear (or affirm) that in my office of justice of the Supreme Court of North Carolina I will administer justice without respect to persons, and do equal right to the poor and the rich, to the State and to individuals; and that I will honestly, faithfully, and impartially perform all the duties of the said office according to the best of my abilities, and agreeably to the Constitution and laws of the State; so help me, God.

Judge of the Superior Court

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of judge of the superior court of the said State; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not wittingly or willingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or order notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Justice of the Peace

I, A. B., do solemnly swear (or affirm) that as justice of the peace of the county of, in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the State; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and amercements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment; I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the State, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the

best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of, in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of Secretary of State of the State of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of State Treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partially, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of, according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of, in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury

in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of according to the best of my skill and ability, according to law; so help me, God. (R. C., c. 76, s. 6; 1874-5, c. 58, s. 2; Code, ss. 3057, 3315; 1903, c. 604; Rev., s. 2360; C. S., s. 3199; 1947, c. 71.)

Cross Reference. — As to oath of members of finance committee of county, see § 153-45.

Editor's Note. — The 1947 amendment changed the form of oath provided for a jury officer.

Chapter 12.

Statutory Construction.

Sec.

12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.

Sec.

12-2. Repeal of statute not to affect actions.

12-3. Rules for construction of statutes.

12-4. Construction of amended statute.

§ 12-1. No public-local or private act may amend or repeal public law unless latter is referred to in caption.—No act, which by its caption purports to be a public-local or private act, shall have the force and effect to repeal, alter or change the provisions of any public law, unless the caption of said public-local or private act shall make specific reference to the public law it attempts to repeal, alter or change. (1929, c. 250, s. 1.)

Cited in *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939); *Carroll v. North*

Carolina State Firemen's Ass'n, 230 N. C. 436, 53 S. E. (2d) 524 (1949).

§ 12-2. Repeal of statute not to affect actions.—The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (1830, c. 4; R. C., c. 108, s. 1; 1879, c. 163; 1881, c. 48; Code, s. 3764; Rev., s. 2830; C. S., s. 3948.)

Section Not Obligatory.—As the laws of our legislature do not bind another, except in so far as they may be absolute contracts, this section must be taken as merely a rule of construction having no application where the intention of the legislature clearly and explicitly appears to the contrary. *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177 (1900).

Repeal after Services Rendered.—Where a statute was in force when certain services were rendered, it was held that the plaintiff's right had become absolute, and no subsequent repeal could invalidate it. *Copple v. Commissioners*, 138 N. C. 127, 50 S. E. 574 (1905).

Action Commenced before Repeal.—By express terms of the section, the repeal of a statute does not affect an action theretofore commenced under it. *Smith v. Morganton Ice Company*, 159 N. C. 151, 74 S. E. 961 (1912).

Same—For Penalty or Forfeiture.—Under the provisions of the section a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. *State v. Williams*, 97 N. C. 455, 2 S. E. 55 (1887); *Epps v. Smith*, 121 N. C. 157, 28 S. E. 359 (1897); *Grocery Co. v. Southern R. Co.*, 136 N. C. 396, 48 S. E. 801 (1904).

Subject Matter Destroyed by Statute Pending Appeal.—Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, the Supreme Court will not go into consideration of the abstract question as to which party ought to have

prevailed, in order to adjudicate the costs but the judgment below as to costs will be allowed to stand. *Wikel v. Board*, 120 N. C. 451, 27 S. E. 117 (1897); *Brinson v. Duplin County*, 173 N. C. 137, 91 S. E. 708 (1917).

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interferences. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away. *Cooley's Constitutional Limitations*, p. 517; *Black's Const. Law*, p. 432; *Williams v. Atlantic Coast Line R. Co.*, 153 N. C. 360, 69 S. E. 402 (1910). This case contains an excellent discussion which will be of aid in determining when a right is vested.

Right of Informer.—An informer has, in a certain sense, an inchoate right when he brings his suit, but he has no vested right to the penalty until judgment. Hence, until his right becomes vested, it can be destroyed by the legislature. *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177 (1900).

Action to Recover Arrearages of Taxes.—An action pending to recover arrearages of taxes, brought under an act authorizing the collection of unpaid taxes for past years, is not affected by the repeal of such statute. *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9 (1898).

Changing Rules of Evidence.—An act of the legislature changing the rules of evidence can not be construed as operating retrospectively so as to affect existing

rights. *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539 (1893).

Modes of Procedure.—Statutes which change modes of procedure may govern suits pending at the time of their enactment. *Sumner v. Miller*, 64 N. C. 688 (1870).

A retrospective law is one that in some way affects the rights and liabilities of parties incident to and growing out of a transaction that has passed. *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694 (1916).

Maxim “Leges Posteriores Priores Contrarias Abrogant.”—To give operation to the maxim, *leges posteriores priores contrarias abrogant*, the latter law must be in conflict with the former; therefore, when a later statute is almost in *ipsisimis verbis* with a former one: Held, that there was no repeal of the former. *Kesler v. Smith*, 66 N. C. 154 (1872).

General Rule—Prospective Effect.—The general rule is that a statute will be given prospective effect only unless the law in question clearly forbids such a construction. *Elizabeth City v. Commissioners*, 146 N. C. 539, 60 S. E. 416 (1908); *Mann v. Allen*, 171 N. C. 219, 88 S. E. 235 (1916); *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694 (1916).

Remedial Legislation.—In case of a remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the legislature. *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694 (1916).

Mere Court Procedure.—The rule that statutes may be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitu-

tion or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694 (1916).

Limitation of Actions.—While the legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a bar. *Strickland v. Draughan*, 91 N. C. 103 (1884); *Cooley Const. Lim.* 450 (8 Ed.), and cases there cited. The action in the instant case having been instituted before the passage of the act, is not affected by it. *Nichols v. Norfolk, etc., R. Co.*, 120 N. C. 495, 26 S. E. 643 (1897).

General Rule in Criminal Actions.—The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. *State v. Williams*, 97 N. C. 455, 2 S. E. 55 (1887); *State v. Massey*, 103 N. C. 356, 9 S. E. 632 (1889).

Same—Legislative Authority to Increase Punishment.—The legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the federal Constitution, which forbids the enactment by a state of any *ex post facto* law, could, in either event, be invoked for the protection of the person charged. *Ordronaux Cons. Leg.*, p. 223; *State v. Williams*, 97 N. C. 455, 2 S. E. 55 (1887); *State v. Ramsour*, 113 N. C. 642, 18 S. E. 707 (1893).

§ 12-3. Rules for construction of statutes.—In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

1. **Singular and Plural Number, Masculine Gender, etc.**—Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

2. **Authority, to Three or More Exercised by Majority.**—All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

3. **“Month” and “Year.”**—The word “month” shall be construed to mean a

calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

4. Leap Year, How Counted.—In every leap year the increasing day and the day before, in all legal proceedings, shall be counted as one day.

5. "Oath" and "Sworn."—The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

6. "Person" and "Property."—The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendable to heirs at law. The word "property" shall include all property, both real and personal.

7. "Preceding" and "Following."—The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

8. "Seal."—In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

9. "Will."—The term "will" shall be construed to include codicils as well as wills.

10. "Written" and "in Writing."—The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

11. "State" and "United States."—The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

12. "Imprisonment for One Month," How Construed.—The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

13. "Governor," "Senator," "Solicitor," "Elector," "Executor," "Administrator," "Collector," "Juror," and "Auditor."—The words "Governor," "Senator," "solicitor," "elector," "executor," "administrator," "collector," "juror," "auditor," and any other words of like character shall when applied to the holder of such office, or occupant of such position, be words of common gender, and they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman. (21 Hen. III; R. S., c. 31, s. 113; R. C., c. 31, s. 108; R. C., c. 108; Code, s. 3765; Rev., s. 2831; C. S., s. 3949; 1921, c. 30.)

I. General Consideration.

II. Determination of Intent and Meaning.

A. In General.

B. Legislative Intent.

III. Similar and Related Acts.

A. In General.

B. Statutes in Pari Materia.

C. Amendatory and Repealing Acts.

IV. Statutes Strictly Construed.

A. In General.

B. Criminal Statutes.

V. Construction in Accord with Constitution.

- A. Construction.
- B. Effect.

VI. Definitions.

I. GENERAL CONSIDERATION.

Specific Words Followed by General Words. — Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by a proper interpretation, be confined to acts and things of the same kind. *State v. Craig*, 176 N. C. 740, 97 S. E. 400 (1918).

Words Given Ordinary Meaning. — When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. *Abernethy v. Board*, 169 N. C. 631, 86 S. E. 577 (1915).

When Court May Interpolate Necessary Words. — When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950 (1905); *Abernethy v. Board*, 169 N. C. 631, 86 S. E. 577 (1915).

In *Palms v. Shawano*, 61 Wis. 217, the words "south" used in the legislative act defining the boundaries of a county was read "north"; in *Stoneman v. Whaley*, 9 Iowa 390, a subsequent act purported to repeal the sixteenth section of another act, and it was held that the repealing act referred to the sixth section; and in a case from Utah a subsequent act referred to § 162 of a prior act, and it was construed to mean § 151. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 88 S. E. 215 (1916).

Proviso.—As a general rule in the construction of statutes, a proviso will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the proviso will be ascertained by the language used in it. *Traders Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363 (1887).

Words Cannot Be Construed Away. — The court has no power or right to strike out words or to construe them away. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116 (1908).

When laws have been codified, it is permissible to examine the original legislation as an aid to correct interpretation. *Rodgers & Co. v. Bell*, 156 N. C. 378, 72 S. E. 817 (1911); *Morganton Mfg., etc.*,

Co. v. Andrews, 165 N. C. 285, 81 S. E. 418 (1914).

The maxim cessante ratione legis, cessat et ipsa lex has no application in the construction of statutes. *State v. Eaves*, 106 N. C. 752, 11 S. E. 370 (1890).

Void for Vagueness.—If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. *State v. Partlow*, 91 N. C. 550 (1884).

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

When Statute Is Clear.—It is not allowable to interpret what has no need of interpretation, or, where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116 (1908); *State v. Carpenter*, 173 N. C. 767, 92 S. E. 373 (1917); *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219, 20 S. Ct. 155 (1899).

Where Language Is of Doubtful Meaning. — In interpreting the statute where the language is of doubtful meaning, the court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116 (1908).

Meaning First Sought in Language Used. — In *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), the court said: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it; the sole function of the courts is to enforce it according to its terms." *State v. Carpenter*, 173 N. C. 767, 92 S. E. 373 (1917).

Law Existing at Time of Enactment.—To discover the true meaning of a statute, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. *Kendall v. Stafford*, 178 N. C. 461, 101 S. E. 15 (1919).

But the meaning must be ascertained from the statute itself, and the means and signs of which, as appears upon its face, it has reference. *State v. Partlow*, 91 N. C. 550 (1884).

Objects Embraced.—The meaning of a statute in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. *State v. Partlow*, 91 N. C. 550 (1884);

Misdescription or Misnomer. — The question was fully considered by the Supreme Court in *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950 (1905), and the court there says: "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing." *Black Interp. of Laws*, § 558. Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 88 S. E. 215 (1916).

The title of a statute is no part thereof. *State v. Welsh*, 10 N. C. 404 (1824). But it may be construed when the meaning is doubtful. *State v. Woolard*, 119 N. C. 779, 25 S. E. 719 (1896).

It cannot control the text when it is clear. *Blue v. McDuffie*, 44 N. C. 131 (1852); *Jones v. Hartford Ins. Co.*, 88 N. C. 499 (1883); *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434 (1886); *State v. Woolard*, 119 N. C. 779, 25 S. E. 719 (1896). Especially is this true as to the headings of a section in the Code. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197

(1895); *In re Chisholm's Will*, 176 N. C. 211, 96 S. E. 1031 (1918).

B. Legislative Intent.

Motive and Purpose of Legislation.—If the language of a statute is doubtful, and the intention of the legislature is clear, the former will be construed in the latter; but where the language is plain, the courts can not look into the motive or purpose of the legislature in the enactment of the law. *State v. Eaves*, 106 N. C. 752, 11 S. E. 370 (1890).

Same—Understanding of Individual. — Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. *State v. Boon*, 1 N. C. 191 (1801); *Drake v. Drake*, 15 N. C. 110 (1833); *Adams v. Turrentine*, 30 N. C. 147 (1847); *State v. Melton*, 44 N. C. 49 (1852); *Blue v. McDuffie*, 44 N. C. 131 (1852); *State v. Partlow*, 91 N. C. 550 (1884).

Same—Same—Affidavit of Legislators.—In interpreting a statute it is not permissible to show its intent and meaning by affidavit of legislators, for such must be gathered from the act itself. *Goins v. Trustees Indian Training School*, 169 N. C. 736, 86 S. E. 629 (1915).

Harmonizing Context. — It is the duty of the court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116 (1908).

Effectuation of Purpose. — Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. *State v. Partlow*, 91 N. C. 550 (1884); *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950 (1905).

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the legislature can be gathered from the context or from the general purpose and tenor of the enactment. *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950 (1905).

Mistakes or Omissions.—Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the legislature can be collected from the whole statute. If the mistake renders the intention doubtful, the courts will look

to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 88 S. E. 215 (1916), quoting *Nazro v. Ins. Co.*, 14 Wis. 298.

Impossible Requirements.—In the construction of a statute the court will avoid attributing to the legislature the intention to punish the failure to do an impossible thing. *Garrison v. Southern R. Company*, 150 N. C. 575, 64 S. E. 578 (1909).

Proviso Prevails over Purview.—When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the legislature. *Orinoco Supply Co. v. Masonic, etc.*, *Star Home*, 163 N. C. 513, 79 S. E. 964 (1913).

As to Whether Statute Mandatory or Directory.—There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of the legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. *Spruill v. Davenport*, 178 N. C. 364, 100 S. E. 527 (1919).

III. SIMILAR AND RELATED ACTS.

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act.—That words and phrases, the meaning of which, in a statute, has been ascertained, are, when read in a subsequent statute, to be understood in the same sense. And where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or county, or by that of another, that construction is to be given to the later statute. It is presumed that the legislature which passed the latter statute knew the judicial construction which had been placed on the former one, and such a construction becomes a part of the law. *Bridgers v. Taylor*, 102 N. C. 86, 8 S. E. 893 (1889).

Permissible to Look at Other Statutes.—To ascertain the mischief which an act of the legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to one under

construction. *Abernethy v. Board*, 169 N. C. 631, 86 S. E. 577 (1915).

It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation. *State Board v. White Oak Buckle Drainage District*, 177 N. C. 222, 98 S. E. 597 (1919).

B. Statutes in Pari Materia.

Statutes relating to the same subject matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the legislature. *Allen v. Reidsville*, 178 N. C. 513, 101 S. E. 267 (1919).

Where a former act has been repealed, or has expired by its limitation when it is in *pari materia*, it must be considered in connection with the last act and if necessary, a part of it. *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899).

Where there are different statutes in *pari materia*, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899).

Same—Apparent Conflict.—“Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act.” *Black's Interpretation of Laws* (1896), p. 60, § 32; *Peoples Bank v. Loven*, 172 N. C. 666, 90 S. E. 948 (1916); *State Board v. White Oak Buckle Drainage District*, 177 N. C. 222, 98 S. E. 597 (1919).

Acts of Same Session of Legislature.—All acts of the same session of the legislature upon the same subject matter are considered as one act, and must be con-

strued together, under the doctrine of "in pari materia." They should be considered in pari materia, whether passed at the same session or not. *Walser v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899).

Act Declaratory of Intent of Previous Act.—An act of the legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in actions prior to the declaratory act. *Rodwell v. Harrison*, 132 N. C. 45, 43 S. E. 540 (1903).

Private and Local Acts.—Private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of the general law. *State v. Womble*, 112 N. C. 862, 17 S. E. 491 (1893).

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory.—Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 88 S. E. 215 (1916).

Amended and Amending Acts Construed Together.—Where an amendment to an existing statute is enacted the proper method of arriving at their true intent and meaning is by construing together. *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640 (1916); *Township Road Comm. v. Board of Com'rs*, 178 N. C. 61, 100 S. E. 122 (1919).

When Amendatory Act Refers to Wrong Section.—If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. *Toomey v. Goldsboro Lumber Co.*, 171 N. C. 178, 88 S. E. 215 (1916).

Erroneous Statement of Date.—An act of the legislature subsequent to and in amendment of a former act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended act is erroneously stated, provided it sufficiently appears beyond cavil, what prior act is referred to. *State v. Woolard*, 119 N. C. 779, 25 S. E. 719 (1896).

Summary of Rules of Construing Repealing Acts.—In *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417 (1896), it was said: Upon a perusal of the authorities it appears that the courts have universally

given their sanction to the following rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. *State v. Woodside*, 30 N. C. 104 (1847); *Simonton v. Lanier*, 71 N. C. 498 (1874). (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the legislature as a substitute. *State v. Custer*, 65 N. C. 339 (1871). (3) Where a later or revising statute clearly covers the whole subject matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by a necessary implication.

Repeal of Act Giving Forfeiture.—The repeal of an act of assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. *Governor v. Howard*, 5 N. C. 465 (1810).

Repeal of Repealing Act.—The repeal of a statute repealing a former statute leaves the latter in force. *Brinkley v. Swicegood*, 65 N. C. 626 (1871).

Implied Repeal by Lessening Degree of Crime.—It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmatively lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. *State v. Upchurch*, 31 N. C. 454 (1849).

When Acts Irreconcilably Inconsistent.—A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. *State v. Massey*, 103 N. C. 356, 9 S. E. 632 (1889).

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law. — A statute in derogation of the common law must be strictly construed. *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919).

Acts Limiting Rights to Contract. — Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. *Marriner & Bro. v. Roper Co.*, 112 N. C. 164, 16 S. E. 906 (1893).

Mandatory Act. — No provision, it would seem, could be more mandatory, in form or substance, than one which declares that noncompliance with it shall make void the act of the body required to observe its requirements. *Spruill v. Davenport*, 178 N. C. 364, 100 S. E. 527 (1919).

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction. *State v. Sullivan*, 110 N. C. 513, 14 S. E. 796 (1892).

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed. *Skinner v. Thomas*, 171 N. C. 98, 87 S. E. 976 (1916).

Acts Restricting Private Acts. — Statutes which restrict the private rights of persons or the use of property in which the public have no concern should be strictly construed. *Nance v. Southern Railway*, 149 N. C. 366, 63 S. E. 116 (1908).

Local Lien Law. — In *Orinoco Supply Co. v. Masonic, etc., Star Home*, 163 N. C. 513, 79 S. E. 964 (1913), it was held that a lien law applicable to certain counties only, was local in its nature, and being contrary to the general lien laws of the State, must be strictly construed.

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3 (1914).

B. Criminal Statutes.

Rule for Construction of Penal Statutes. — It is familiar learning that penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all other instruments, but not liberally, so as

to stretch their meaning beyond what the words will warrant. 36 Cyc., 1185, 1186, 1187; *Coble v. Schoffner*, 75 N. C. 42 (1876); *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779 (1887); *Sears v. Whitaker*, 136 N. C. 37, 48 S. E. 517 (1904); *Alexander v. Atlantic Coast Line R. Co.*, 144 N. C. 93, 56 S. E. 697 (1907); *Hamlet Grocery Co. v. Southern R. Co.*, 170 N. C. 241, 87 S. E. 57 (1915).

Rule Explained. — The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is a reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434 (1886).

This rule is, however, never to be applied so strictly as to defeat the clear intention of the legislature, and if the intention to impose the penalty clearly appears, that is sufficient, and it must prevail. *Hines v. Wilmington, etc., Railroad*, 95 N. C. 434 (1886).

Supplying Omission and Strained Constructions. — In *State v. Massey*, 103 N. C. 356, 9 S. E. 632 (1889), it was announced that as a policy it is more dangerous for the Supreme Court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished.

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

General Rule. — Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the court. *State v. Pool*, 74 N. C. 402 (1876).

Valid and Invalid Portions of Same Act. — Where there are distinct and valid provisions of a statute, with unconstitutional provisions, the two portions of the law being separate and it appearing from a perusal of the statute that the legislature intended the valid portion to be effective independently of the invalid part, the valid provisions may be enforced. *Archer v. Joyner*, 173 N. C. 75, 91 S. E. 699 (1917).

In Black on Constitutional Law the rule is said to be: "That if the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent." Quoted in *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640 (1916).

The position, however, is not allowed to prevail when the parts of the statute are so connected and dependent the one upon the other that to eliminate one will work substantial change to the portion which remains. Thus, in Black's work, the author says, page 63: "And if the unconstitutional clause cannot be rejected without causing the statute to enact what the legislature did not intend, the whole statute must fall." *Riggsbee v. Durham*, 94 N. C. 800 (1886); *Greene v. Owen*, 125 N. C. 212, 34 S. E. 424 (1899); *Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640 (1916). See *State v. Godwin*, 123 N. C. 697, 31 S. E. 221 (1898).

Resort to Implication. — Courts may resort to an implication to sustain an act, but not to destroy it. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905).

Presumption in Favor of Validity. — Every presumption is in favor of the validity of an act of the legislature and all doubts are resolved in support of the act. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905).

It is never to be presumed that the legislature intends an infringement of the Constitution, even when the infringement is palpable; but it is to be set down to inadvertence or mistake, or unconscious bias from pressing circumstances. *Jacobs v. Smallwood*, 63 N. C. 112 (1869).

When Object Is Valid and Effect Invalid. — A statute, while its object may be legitimate and altogether praiseworthy, is, nevertheless, invalid if its effect is unconstitutional. *Jacobs v. Smallwood*, 63 N. C. 112 (1869).

B. Effect.

Liability of Public Officer under Unconstitutional Act. — An individual officeholder is not required to be wiser than the whole people represented in their General Assembly; therefore, he is not indictable for obeying an unconstitutional legislative act (unless it required the commission of a crime, which is not for a moment to be supposed); nor is he indictable for refusing to perform certain duties under a former law repealed by a subsequent unconstitutional

statute, until at least after a decision by competent authority. *State v. Godwin*, 123 N. C. 697, 31 S. E. 221 (1898).

When Court Reverses Itself Decision Not Retroactive. — Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect. *Fowle & Son v. Ham*, 176 N. C. 12, 96 S. E. 639 (1918).

VI. DEFINITIONS.

Purpose. — Paragraph one of this section was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they," "himself or themselves," to be met with in some badly drawn statutes. *Von Glahn v. Harris*, 73 N. C. 323 (1875).

"Person" Extends to "Persons." — The word "person" is construed to extend to "persons" under the authority of paragraph one of this section. *State v. Wilkerson*, 98 N. C. 696, 3 S. E. 683 (1887); *State v. Dunn*, 134 N. C. 663, 46 S. E. 949 (1904).

The words "twelve months," in the absence of any legislative definition of the word "month" and the word "year," will be interpreted to mean twelve calendar, not lunar, months. *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94 (1891).

Month. — The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. *State v. Upchurch*, 72 N. C. 146 (1875). In this respect our statute has adopted the computation of the civil instead of the common law. *Satterwhite v. Burwell*, 51 N. C. 92 (1858); *Adcock v. Fuquay Springs*, 194 N. C. 423, 140 S. E. 24 (1927).

"Thirty days," as used in Art. IV of the Constitution, is not synonymous with "one month"; it may be more or less. *State v. Upchurch*, 72 N. C. 146 (1875).

Does Not Affect Constitution. — The provisions of paragraph six of this section could not affect the meaning of the terms employed in the Constitution; indeed, it purports to apply only to statutes, and to them, when the meaning is manifestly otherwise than as therein provided and defined. *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. 845 (1890).

"Property" Used in Limited Sense. — While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its

limited sense, and this is so notwithstanding the statutory provision. *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. 845 (1890).

A chose in action is property, and embraced in the terms of paragraph six of this section. *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198 (1889).

A promissory note or due bill being an "evidence of debt" is embraced in the term "personal property." *State v. Sneed*, 121 N. C. 614, 28 S. E. 365 (1897).

Money.—While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not intended, that interpretation will be given it by the courts with which the testator had evidently employed it. *Patterson v. Wilson*, 101 N. C. 584, 8 S. E. 229 (1888).

The word "estate" has a broader mean-

ing than the word "property." The latter word could not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in this section. *Vaughan v. Murfreesboro*, 96 N. C. 317, 2 S. E. 676 (1887).

Juror.—It was held in *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858 (1944), that a woman was incompetent to serve as a juror. It should be noted, however, that this case was decided prior to the 1945 amendment to § 13 of Art. 1 of the Constitution of North Carolina, which substituted the words "good and lawful persons" in lieu of the words "good and lawful men" formerly appearing in such constitutional provision. For note discussing the case of *State v. Emery*, see 25 N. C. Law Rev. 152.—Ed. Note.

§ 12-4. Construction of amended statute.—Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C. S., s. 3950.)

Editor's Note.—See 12 N. C. Law Rev. 262.

Amending Act Presumed Not to Repeal.—Where a statute only undertakes to amend one already on the statute books, it will be presumed that it did not intend to repeal it, unless there is an express repealing clause. *State v. Massey*, 97 N. C. 465, 2 S. E. 445 (1887); *State v. Broadway*, 157 N. C. 598, 72 S. E. 987 (1911).

Time of Enactment of New Proviso.—By this section when a part of the statute is amended, the new proviso is considered as having been enacted at the time of the amendment, and the act of 1885, amendatory of the Code of 1883 is subject to this rule of construction. *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312 (1890).

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. *Nichols v. Board*, 125 N. C. 13, 34 S. E. 71 (1899).

Re-enacted Contemporaneous with Repeal.—It was held in *State v. Williams*, 117 N. C. 753, 23 S. E. 250 (1895), that: "The re-enactment by the legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a re-affirmance of the former law, whose provisions are thus continued without any intermission." *State v. Sutton*, 100 N. C.

474, 6 S. E. 687 (1888); *State v. Bellamy*, 120 N. C. 212, 27 S. E. 113 (1897); *State v. Southern R. Co.*, 125 N. C. 666, 34 S. E. 527 (1899).

Bill of Indictment.—If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. *State v. Massey*, 97 N. C. 465, 2 S. E. 445 (1887).

Misdemeanor Made Punishable by Fine or Imprisonment.—A public-local law making an act a misdemeanor is not repealed by a statute, making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense; the later statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense has been committed prior to the enactment of the latter act, it is punishable under the prior law. *State v. Mull*, 178 N. C. 748, 101 S. E. 89 (1919).

Division III. Criminal Law and Procedure.

	PAGE
Chap. 13. Citizenship Restored	393
14. Criminal Law	396
15-19. See Volume 1C.	

Chapter 13.

Citizenship Restored.

Sec.	Sec.
13-1. Petition filed.	13-8. Contents of petition; affidavits of reputable citizens; hearing; decree of restoration.
13-2. When and where petition filed.	13-9. Restoration of citizenship to persons convicted, etc., of involuntary manslaughter.
13-3. Notice given.	13-10. Contents of petition; supporting affidavits; hearing and decree.
13-4. Hearing and evidence.	
13-5. Decree.	
13-6. Procedure in case of pardon or suspension of judgment.	
13-7. Restoration of rights of citizenship to persons committed to certain training schools.	

§ 13-1. **Petition filed.**—Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship. (1840, c. 36, s. 4; R. C., c. 58, ss. 1, 3; Code, ss. 2938, 2940; Rev., s. 2675; C. S., s. 385.)

Cross References. — As to infamous crimes generally, see §§ 14-1, 14-2, 14-3. See also, the North Carolina Const., Art. II, § 11; Art. VI, § 8.

Loss of Citizenship.—Loss of citizenship

does not form a part of the judgment of the court, but follows as a consequence of such judgment. *State v. Jones*, 82 N. C. 685 (1880).

§ 13-2. **When and where petition filed.**—At any time after the expiration of two years from the date of discharge of the petitioner, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found. (1840, c. 36, s. 3; R. C., c. 58, ss. 3, 4; Code, ss. 2940, 2941; 1897, c. 110; Rev., s. 2676; C. S., s. 386; 1933, c. 243.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 243, the petition was permitted to be filed after "four years from the date of conviction," instead of "two years from the date of discharge" as is now permitted.

§ 13-3. **Notice given.**—Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard. (1840, c. 36; R. C., c. 58, s. 1; Code, s. 2938; Rev., s. 2677; C. S., s. 387.)

§ 13-4. **Hearing and evidence.**—The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this State for

three years next preceding the filing of the petition. (1840, c. 36; R. C., c. 58, ss. 1, 2; Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; Rev., s. 2678; C. S., s. 388.)

§ 13-5. Decree.—At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of the applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto. (1840, c. 36; R. C., c. 58, s. 1; Code, s. 2938; Rev., s. 2679; C. S., s. 389.)

§ 13-6. Procedure in case of pardon or suspension of judgment.—Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the Governor, or the court suspended judgment on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the Governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon as been granted by the Governor, and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction. (1899, cc. 44, 249; 1905, c. 547; Rev., s. 2680; C. S., s. 390.)

Application.—This section is not applicable where one has been convicted of an infamous crime, imprisoned, and pardoned by the Governor. In re Petition of Jones, 160 N. C. 15, 75 S. E. 1007 (1912).

§ 13-7. Restoration of rights of citizenship to persons committed to certain training schools.—Any person convicted of any crime whereby any rights of citizenship are forfeited, and the judgment of the court pronounced provides a sentence, and such sentence is suspended upon the condition that such person be admitted to and remain at one of the following schools: Eastern Carolina Industrial Training School for Boys, the Stonewall Jackson Manual Training and Industrial School, the Morrison Training School for Negro Boys, or the State Home and Industrial School for Girls, until lawfully discharged, and upon payment of costs, such person may be restored to such forfeited rights of citizenship upon application and petition to the judge presiding at any term of the superior court held in the county in which the conviction was had, at any time after one year from the date of the lawful discharge from any such school. (1937, c. 384, s. 1.)

§ 13-8. Contents of petition; affidavits of reputable citizens; hearing; decree of restoration.—The petition provided for in § 13-7 shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and shall recite that the costs of suit have been paid, the lawful discharge of the applicant from the school to which he or she was admitted, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten

reputable citizens of the county in which said conviction took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1937, c. 384, s. 2.)

§ 13-9. Restoration of citizenship to persons convicted, etc., of involuntary manslaughter.—Any person who has been convicted of, or confessed guilt to, the crime of involuntary manslaughter and is not actually serving a term in the State prison or on the roads of the State may, at any subsequent term of the superior court of the county in which the conviction was had, or the confession of guilt made, make application and petition the court for a restoration of all forfeited rights of citizenship. (1941, c. 184, s. 1.)

Cross Reference.—As to punishment for involuntary manslaughter, see § 14-18.

§ 13-10. Contents of petition; supporting affidavits; hearing and decree.—The petition provided for in § 13-9 shall set out the nature of the crime committed, the time of conviction or confession of guilt, the judgment of the court, and shall recite that the costs of suit have been paid, and that applicant has never before had restored to him lost rights of citizenship, which petition shall be verified by the oath of the applicant, and accompanied by the affidavits of ten reputable citizens of the county in which said conviction or confession of guilt took place, who shall state that they are well acquainted with the applicant, and that they are of the opinion that the applicant should have restored to him the lost rights of citizenship. The petition shall be heard by the judge during a term of court, and if he is satisfied as to the truth of the matters set out in the petition and the affidavits, he shall have the authority to decree the applicant's restoration to the lost rights of citizenship and the clerk shall spread the decree upon his minute dockets. (1941, c. 184, s. 2.)

Chapter 14. Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Felonies and Misdemeanors.

Sec.

- 14-1. Felonies and misdemeanors defined.
- 14-2. Punishment of felonies.
- 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, etc.
- 14-4. Violation of town ordinance misdemeanor; punishment.

Article 2.

Principals and Accessories.

- 14-5. Accessories before the fact; trial and punishment.
- 14-6. Punishment of accessories before the fact.
- 14-7. Accessories after the fact; trial and punishment.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Article 3.

Rebellion.

- 14-8. Rebellion against the State.
- 14-9. Conspiring to rebel against the State.
- 14-10. Secret political and military organization forbidden.

Article 4.

Subversive Activities.

- 14-11. Activities aimed at overthrow of government; use of public buildings.
- 14-12. Punishment for violations.
- 14-12.1. Certain subversive activities made unlawful.

Article 5.

Counterfeiting and Issuing Monetary Substitutes.

- 14-13. Counterfeiting coin and uttering coin that is counterfeit.
- 14-14. Possessing tools for counterfeiting.
- 14-15. Issuing substitutes for money without authority.
- 14-16. Receiving or passing unauthorized substitutes for money.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

Sec.

- 14-17. Murder in the first and second degree defined; punishment.
- 14-18. Punishment for manslaughter.
- 14-19. Punishment for second offense of manslaughter.
- 14-20. Killing adversary in duel; aiders and abettors declared accessories.

Article 7.

Rape and Kindred Offenses.

- 14-21. Punishment for rape.
- 14-22. Punishment for assault with intent to commit rape.
- 14-23. Emission not necessary to constitute rape and buggery.
- 14-24. Obtaining carnal knowledge of married woman by personating husband.
- 14-25. Attempted carnal knowledge of married woman by personating husband.
- 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.
- 14-27. Jurisdiction of court; offenders classed as delinquents.

Article 8.

Assaults.

- 14-28. Malicious castration.
- 14-29. Castration or other maiming without malice aforethought.
- 14-30. Malicious maiming.
- 14-31. Maliciously assaulting in a secret manner.
- 14-32. Assault with deadly weapon with intent to kill resulting in injury.
- 14-33. Punishment for assault.
- 14-34. Assaulting by pointing gun.

Article 9.

Hazing.

- 14-35. Hazing; definition and punishment.
- 14-36. Expulsion from school; duty of faculty to expel.
- 14-37. Certain persons and schools excepted; copy of article to be posted.
- 14-38. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.

CHAPTER 14. CRIMINAL LAW

Article 10.

Kidnapping and Abduction.

Sec.

- 14-39. Kidnapping.
- 14-40. Enticing minors out of the State for the purpose of employment.
- 14-41. Abduction of children.
- 14-42. Conspiring to abduct children.
- 14-43. Abduction of married women.

Article 11.

Abortion and Kindred Offenses.

- 14-44. Using drugs or instruments to destroy unborn child.
- 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.
- 14-46. Concealing birth of child.

Article 12.

Libel and Slander.

- 14-47. Communicating libelous matter to newspapers.
- 14-48. Slandering innocent women.

Article 13.

Injuring Others by Use of High Explosives.

- 14-49. Willful injury a felony; punishment.
- 14-50. Conspiracy declared a felony; punishment.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 14.

Burglary and Other Housebreakings.

- 14-51. First and second degree burglary.
- 14-52. Punishment for burglary.
- 14-53. Breaking out of dwelling house burglary.
- 14-54. Breaking into or entering houses otherwise than burglariously.
- 14-55. Preparation to commit burglary or other housebreakings.
- 14-56. Breaking into or entering railroad cars.
- 14-57. Burglary with explosives.

Article 15.

Arson and Other Burnings.

- 14-58. Punishment for arson.
- 14-59. Burning of certain public and other corporate buildings.
- 14-60. Setting fire to schoolhouse.
- 14-61. Burning or attempting to burn certain bridges and buildings.

Sec.

- 14-62. Setting fire to churches and certain other buildings.
- 14-63. Burning boats and barges.
- 14-64. Burning of ginhouses, tobacco houses and stables.
- 14-65. Fraudulently setting fire to dwelling houses.
- 14-66. Willful and malicious burning of personal property.
- 14-67. Attempting to burn dwelling houses and certain other buildings.
- 14-68. Failure of owner of property to comply with orders of public authorities.
- 14-69. Failure of officers to investigate incendiary fires.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

- 14-70. Distinction between grand and petit larceny abolished.
- 14-71. Receiving stolen goods.
- 14-72. Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.
- 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.
- 14-73.1. Jurisdiction generally in cases of larceny and receiving stolen goods; petty misdemeanors.
- 14-74. Larceny by servants and other employees.
- 14-75. Larceny of chose in action.
- 14-76. Larceny, mutilation, or destruction of public records and papers.
- 14-77. Larceny, concealment or destruction of wills.
- 14-78. Larceny of ungathered crops.
- 14-78.1. Trading for corn without permission of owner of premises.
- 14-79. Larceny of ginseng.
- 14-80. Larceny of wood and other property from land.
- 14-81. Larceny of horses and mules.
- 14-82. Taking horses or mules for temporary purposes.
- 14-83. [Repealed.]
- 14-84. Larceny of taxed dogs misdemeanor.
- 14-85. Pursuing or injuring livestock with intent to steal.
- 14-86. Destruction or taking of soft drink bottles.

Article 17.

Robbery.

- 14-87. Robbery with firearms or other dangerous weapons.

CHAPTER 14. CRIMINAL LAW

Sec.

- 14-88. Train robbery.
- 14-89. Attempted train robbery.

Article 18.

Embezzlement.

- 14-90. Embezzlement of property received by virtue of office or employment.
- 14-91. Embezzlement of State property by public officers and employees.
- 14-92. Embezzlement of funds by public officers and trustees.
- 14-93. Embezzlement by treasurers of charitable and religious organizations.
- 14-94. Embezzlement by officers of railroad companies.
- 14-95. Conspiring with officers of railroad companies to embezzle.
- 14-96. Embezzlement by insurance agents and brokers.
- 14-96.1. Report to Commissioner.
- 14-97. Appropriation of partnership funds by partner to personal use.
- 14-98. Embezzlement by surviving partner.
- 14-99. Embezzlement of taxes by officers.

Article 19.

False Pretenses and Cheats.

- 14-100. Obtaining property by false tokens and other false pretenses.
- 14-101. Obtaining signatures by false pretenses.
- 14-102. Obtaining property by false representation of pedigree of animals.
- 14-103. Obtaining certificate of registration of animals by false representation.
- 14-104. Obtaining advances under promise to work and pay for same.
- 14-105. Obtaining advances under written promise to pay therefor out of designated property.
- 14-106. Obtaining property in return for worthless check, draft or order.
- 14-107. Worthless checks.
- 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.
- 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.
- 14-110. Obtaining entertainment at hotels and boardinghouses without paying therefor.
- 14-111. Fraudulently obtaining credit at hospitals and sanatoriums.
- 14-112. Obtaining merchandise on approval.
- 14-113. Obtaining money by false representation of physical defect.

Article 20.

Frauds.

Sec.

- 14-114. Fraudulent disposal of mortgaged personal property.
- 14-115. Secreting property to hinder enforcement of lien.
- 14-116. Fraudulent entry of horses at fairs.
- 14-117. Fraudulent and deceptive advertising.
- 14-117.1. Use of words "army" or "navy" in name of mercantile establishment.
- 14-118. Blackmailing.

Article 21.

Forgery.

- 14-119. Forgery of bank notes, checks and other securities.
- 14-120. Uttering forged paper.
- 14-121. Selling of certain forged securities.
- 14-122. Forgery of deeds, wills and certain other instruments.
- 14-123. Forging names to petitions and uttering forged petitions.
- 14-124. Forging certificate of corporate stock and uttering forged certificates.
- 14-125. Forgery of bank notes and other instruments by connecting genuine parts.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Trespasses to Land and Fixtures.

- 14-126. Forcible entry and detainer.
- 14-127. Malicious injury to real property.
- 14-128. Injury to trees, woods, crops, etc., near highway; depositing trash near highway.
- 14-129. Taking, etc., of certain wild plants from land of another.
- 14-129.1. Selling or bartering venus fly trap.
- 14-130. Trespass on public lands.
- 14-131. Trespass on land under option by the federal government.
- 14-132. Disorderly conduct in and injuries to public buildings.
- 14-133. Erecting artificial islands and lumps in public waters.
- 14-134. Trespass on land after being forbidden; license to look for estrays.
- 14-135. Cutting, injuring, or removing another's timber.
- 14-136. Setting fire to grass and brush lands and woodlands.

CHAPTER 14. CRIMINAL LAW

Sec.

- 14-137. Wilfully or negligently setting fire to woods and fields.
- 14-138. Setting fire to woodlands and grasslands with campfires.
- 14-139. Starting fires within five hundred feet of areas under protection of State forest service.
- 14-140. Certain fires to be guarded by watchman.
- 14-141. Burning or otherwise destroying crops in the field.
- 14-142. Injuries to dams and water channels of mills and factories.
- 14-143. Taking unlawful possession of another's house.
- 14-144. Injuring houses, churches, fences and walls.
- 14-145. Unlawful posting of advertisements.
- 14-146. Injuring bridges.
- 14-147. Removing, altering or defacing landmarks.
- 14-148. Removing or defacing monuments and tombstones.
- 14-149. Interfering with graveyards.
- 14-150. Disturbing graves.
- 14-151. Interfering with gas, electric and steam appliances.
- 14-152. Injuring fixtures and other property of gas companies; civil liability.
- 14-153. Tampering with engines and boilers.
- 14-154. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.
- 14-155. Making unauthorized connections with telephone and telegraph wires.
- 14-156. Injuring fixtures and other property of electric-power companies.
- 14-157. Felling trees on telephone and electric-power wires.
- 14-158. Interfering with telephone lines.
- 14-159. Injuring buildings or fences; taking possession of house without consent.

Article 23.

Trespasses to Personal Property.

- 14-160. Malicious injury to personal property.
- 14-161. Malicious removal of packing from railway coaches and other rolling stock.
- 14-162. Removing boats or their fixtures and appliances.
- 14-163. Injuring livestock not inclosed by lawful fence.
- 14-164. Taking away or injuring exhibits at fairs.

Article 24.

Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.

Sec.

- 14-165. Malicious or wilful injury to hired personal property.
- 14-166. Subletting of hired property.
- 14-167. Failure to return hired property.
- 14-168. Hiring with intent to defraud.
- 14-169. Violation made misdemeanor.

Article 25.

Regulating the Leasing of Storage Batteries.

- 14-170. "Rental battery" defined; identification of rental storage batteries.
- 14-171. Defacing word "rental" prohibited.
- 14-172. Sale, etc., of rental battery prohibited.
- 14-173. Repairing another's rental battery prohibited.
- 14-174. Time limit on possession of rental battery without written consent.
- 14-175. Violation made misdemeanor.
- 14-176. Rebuilding storage batteries out of old parts and sale of, regulated.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses against Public Morality and Decency.

- 14-177. Crime against nature.
- 14-178. Incest between certain near relatives.
- 14-179. Incest between uncle and niece and nephew and aunt.
- 14-180. Seduction.
- 14-181. Miscegenation.
- 14-182. Issuing license for marriage between white person and negro; performing marriage ceremony.
- 14-183. Bigamy.
- 14-184. Fornication and adultery.
- 14-185. Inducing female persons to enter hotels or boardinghouses for immoral purposes.
- 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.
- 14-187. Permitting unmarried female under eighteen in house of prostitution.
- 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.
- 14-189. Obscene literature.
- 14-190. Indecent exposure; immoral shows, etc.

CHAPTER 14. CRIMINAL LAW

Sec.

- 14-191. Sheriffs and deputies to report violations of two preceding sections.
- 14-192. Cutting or painting obscene words or pictures near public places.
- 14-193. Exhibitions of obscene or immoral pictures; posting of advertisements.
- 14-194. Circulating publications barred from the mails.
- 14-195. Using profane or indecent language on passenger trains.
- 14-196. Using profane or indecent language to female telephone operators.
- 14-196.1. Using profane, vulgar or indecent language to female over telephone.
- 14-197. Using profane or indecent language on public highways, counties exempt.
- 14-198. Lewd women within three miles of colleges and boarding schools.
- 14-199. Obstructing way to places of public worship.
- 14-200. Disturbing religious assembly by certain exhibitions.
- 14-201. Permitting stone-horses and stone-mules to run at large.
- 14-202. Secretly peeping into room occupied by woman.

Article 27.

Prostitution.

- 14-203. Definition of terms.
- 14-204. Prostitution and various acts abetting prostitution unlawful.
- 14-205. Prosecution: In what courts.
- 14-206. Reputation and prior conviction admissible as evidence.
- 14-207. Degrees of guilt.
- 14-208. Punishment; probation; parole.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 28.

Perjury.

- 14-209. Punishment for perjury.
- 14-210. Subornation of perjury.
- 14-211. Perjury before legislative committees.
- 14-212. Perjury in court-martial proceedings.
- 14-213. False oath to statement of insurance company.
- 14-214. False oath to procure benefit of insurance policy or certificate.
- 14-215. False oath to statement required of fraternal benefit societies.

Sec.

- 14-216. False oath to certificate of mutual fire insurance company.

Article 29.

Bribery.

- 14-217. Bribery of officials.
- 14-218. Offering bribes.
- 14-219. Bribery of legislators.
- 14-220. Bribery of jurors.

Article 30.

Obstructing Justice.

- 14-221. Breaking or entering jails with intent to injure prisoners.
- 14-222. Refusal of witness to appear or to testify in investigations of lynchings.
- 14-223. Resisting officers.
- 14-224. Failing to aid police officers.
- 14-225. False, etc., reports to police radio broadcasting stations.
- 14-226. Intimidating or interfering with jurors and witnesses.
- 14-227. Failing to attend as witness before legislative committees.

Article 31.

Misconduct in Public Office.

- 14-228. Buying and selling offices.
- 14-229. Acting as officer before qualifying as such.
- 14-230. Willfully failing to discharge duties.
- 14-231. Failing to make reports and discharge other duties.
- 14-232. Swearing falsely to official reports.
- 14-233. Making of false report by bank examiners; accepting bribes.
- 14-234. Director of public trust contracting for his own benefit.
- 14-235. Speculating in claims against towns, cities and the State.
- 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.
- 14-237. Buying school supplies from interested officer.
- 14-238. Soliciting during school hours without permission of school head.
- 14-239. Allowing prisoners to escape; burden of proof.
- 14-240. Solicitor to prosecute officer for escape.
- 14-241. Disposing of public documents or refusing to deliver them over to successor.
- 14-242. Failing to return process or making false return.
- 14-243. Failing to surrender tax list for inspection and correction.

CHAPTER 14. CRIMINAL LAW

Sec.

- 14-244. Failing to file report of fines or penalties.
- 14-245. Justices of the peace soliciting official business or patronage.
- 14-246. Failure of ex-justice of the peace to turn over books and papers.
- 14-247. Private use of publicly owned vehicle.
- 14-248. Obtaining repairs and supplies for private vehicle at expense of State.
- 14-249. Limitation of amount expended for vehicle.
- 14-250. Publicly owned vehicle to be marked.
- 14-251. Violation made misdemeanor.
- 14-252. Five preceding sections applicable to cities and towns.

Article 32.

Misconduct in Private Office.

- 14-253. Failure of certain railroad officers to account with successors.
- 14-254. Malfeasance of corporation officers and agents.

Article 33.

Prison Breach and Prisoners.

- 14-255. Escape of hired prisoners from custody.
- 14-256. Prison breach and escape.
- 14-257. Permitting escape of or maltreating hired convicts.
- 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.
- 14-259. Harboring or aiding escaped prisoners.
- 14-260. Injury to prisoner by jailer.
- 14-261. Confining prisoners to improper apartments.
- 14-262. Requiring female prisoners to work in chain gang.
- 14-263. Classification and commutation of time for prisoners other than State prisoners.
- 14-264. Record to be kept; items of record.
- 14-265. Commutation of sentences for Sunday work.

Article 34.

Custodial Institutions.

- 14-266. Persuading inmates to escape.
- 14-267. Harboring fugitives.
- 14-268. Violation made misdemeanor.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses against the Public Peace.

Sec.

- 14-269. Carrying concealed weapons.
- 14-270. Sending, accepting or bearing challenges to fight duels.
- 14-271. Engaging in and betting on prize fights.
- 14-272. Disturbing picnics, entertainments and other meetings.
- 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.
- 14-274. Disturbing students at schools for women.
- 14-275. Disturbing religious congregations.
- 14-275.1. Disorderly conduct at bus or railroad station or airport.
- 14-276. Detectives going armed in a body.
- 14-277. Impersonation of peace officers.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Article 36.

Offenses against the Public Safety.

- 14-278. Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.
- 14-279. Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.
- 14-280. Shooting or throwing at trains or passengers.
- 14-281. Operating trains and street cars while intoxicated.
- 14-282. Displaying false lights on seashore.
- 14-283. Exploding dynamite cartridges and bombs.
- 14-284. Keeping for sale or selling explosives without a license.
- 14-285. Failing to enclose marl beds.
- 14-286. Giving false fire alarms; molesting fire alarm system.
- 14-287. Leaving unused well open and exposed.
- 14-288. Unlawful to pollute any bottles used for beverages.

CHAPTER 14. CRIMINAL LAW

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries and Gaming.

Sec.

- 14-289. Advertising lotteries.
- 14-290. Dealing in lotteries.
- 14-291. Selling lottery tickets and acting as agent for lotteries.
- 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.
- 14-292. Gambling.
- 14-293. Allowing gambling in houses of public entertainment; duty of police officers; penalty.
- 14-294. Gambling with faro banks and tables.
- 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.
- 14-296. Illegal slot machines and punchboards defined.
- 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.
- 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by justices and police officers.
- 14-299. Property exhibited by gamblers to be seized; disposition of same.
- 14-300. Opposing destruction of gaming tables and seizure of property.
- 14-301. Operation or possession of slot machine; separate offenses.
- 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.
- 14-303. Violation of two preceding sections a misdemeanor.
- 14-304. Manufacture, sale, etc., of slot machines and devices.
- 14-305. Agreements with reference to slot machines or devices made unlawful.
- 14-306. Slot machine or device defined.
- 14-307. Issuance of license prohibited.
- 14-308. Declared a public nuisance.
- 14-309. Violation made misdemeanor.

Article 38.

Marathon Dances and Similar Endurance Contests.

- 14-310. Dance marathons and walkathons prohibited.
- 14-311. Penalty for violation.
- 14-312. Each day made separate offense.

Article 39.

Protection of Minors.

Sec.

- 14-313. Selling cigarettes to minors.
- 14-314. Aiding minors in procuring cigarettes; duty of police officers.
- 14-315. Selling or giving weapons to minors.
- 14-316. Permitting young children to use dangerous firearms.
- 14-317. Permitting minors to enter bar-rooms, billiard rooms and bowling alleys.
- 14-318. Exposing children to fire.
- 14-319. Marrying females under sixteen years old.
- 14-320. Separating child under six months old from mother.
- 14-321. Failing to pay minors for doing certain work.

Article 40.

Protection of the Family.

- 14-322. Abandonment by husband or parent.
- 14-323. Evidence that abandonment was willful.
- 14-324. Order to support from husband's property or earnings.
- 14-325. Failure of husband to provide adequate support for family.
- 14-326. Abandonment of child by mother.

Article 41.

Intoxicating Liquors.

- 14-327. Adulteration of liquors.
- 14-328. Selling recipe for adulterating liquors.
- 14-329. Manufacturing or selling poisonous liquors.
- 14-330. Selling or giving away liquor near political speaking.
- 14-331. Giving intoxicants to unmarried minors under seventeen years old.
- 14-332. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.

Article 42.

Public Drunkenness.

- 14-333. Public drinking on railway passenger cars; copy of section to be posted.
- 14-334. Public drunkenness and disorderliness.
- 14-335. Local: Public drunkenness.

CHAPTER 14. CRIMINAL LAW

Article 43.

Vagrants and Tramps.

Sec.

- 14-336. Persons classed as vagrants.
- 14-337. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.
- 14-338. Tramp defined and punishment provided; certain persons excepted.
- 14-339. Trespassing and the carrying of dangerous weapons by tramps.
- 14-340. Malicious injuries by tramps to persons and property.
- 14-341. Arrest of tramps by persons who are not officers.

Article 44.

Regulation of Sales.

- 14-342. Selling or offering to sell meat of diseased animals.
- 14-343. Unauthorized dealing in railroad tickets.
- 14-344. Sale of athletic contest tickets in excess of printed price.
- 14-345. Sale of cotton at night under certain conditions.
- 14-346. Sale of convict-made goods prohibited.
- 14-346.1. Sale of bay rum.

Article 45.

Regulation of Employer and Employee.

- 14-347. Enticing servant to leave master.
- 14-348. Local: Hiring servant who has unlawfully left employer.
- 14-349. Enticing seamen from vessel.
- 14-350. Secreting or harboring deserting seamen.
- 14-351. Search warrants for deserting seamen.
- 14-352. Appeal in cases of deserting seamen regulated.
- 14-353. Influencing agents and servants in violating duties owed employers.
- 14-354. Witness required to give self-incriminating evidence; no suit or prosecution to be founded thereon.
- 14-355. Blacklisting employees.
- 14-356. Conspiring to blacklist employees.
- 14-357. Issuing nontransferable script to laborers.
- 14-357.1. Requiring payment for medical examination, etc., as condition of employment.

Article 46.

Regulation of Landlord and Tenant.

- 14-358. Local: Violation of certain contracts between landlord and tenant.

Sec.

- 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.

Article 47.

Cruelty to Animals.

- 14-360. Cruelty to animals; construction of section.
- 14-361. Instigating or promoting cruelty to animals.
- 14-362. Bearbaiting, cockfighting and similar amusements.
- 14-363. Conveying animals in a cruel manner.

Article 48.

Animal Diseases.

- 14-364. [Repealed.]

Article 49.

Protection of Livestock Running at Large.

- 14-365. Failing to show hide and ears of livestock killed while running at large.
- 14-366. Molesting or injuring livestock.
- 14-367. Altering the brands of and misbranding another's livestock.
- 14-368. Placing poisonous shrubs and vegetables in public places.
- 14-369. Wounding, capturing or killing of homing pigeons prohibited.

Article 50.

Protection of Letters, Telegrams, and Telephone Messages.

- 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.
- 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.
- 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.

Article 51.

Protection of Athletic Contests.

- 14-373. Bribery of players, referees, umpires or officials.
- 14-374. Acceptance of bribes by players, referees, umpires or officials.
- 14-375. Completion of offenses set out in sections 14-373 and 14-374.
- 14-376. Bribe defined.
- 14-377. Intentional losing of athletic contest or aiding therein.
- 14-378. Venue.
- 14-379. Bonus or extra compensation.
- 14-380. [Repealed.]

CHAPTER 14. CRIMINAL LAW

Article 52.

Miscellaneous Police Regulations.

Sec.

- 14-381. Desecration of State and National flag.
- 14-382. Pollution of water or lands used for dairy purposes.
- 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.
- 14-384. Injuring notices and advertisements.
- 14-385. Defacing or destroying public notices and advertisements.
- 14-386. Erecting signals and notices in imitation of those of railroads.
- 14-387, 14-388. [Repealed.]
- 14-389. Sale of Jamaica ginger.
- 14-390. Furnishing intoxicants, poisons or firearms to inmates of charitable and penal institutions.
- 14-391. Usurious loans on household and kitchen furniture or assignments of wages.
- 14-392. Digging ginseng on another's land during certain months.
- 14-393. Purchase of ginseng; register to be kept; details.
- 14-394. Anonymous or threatening letters, mailing or transmitting.
- 14-395. Commercialization of American Legion emblem; wearing by non-members.
- 14-396. Dogs on "Capitol Square" worrying squirrels.
- 14-397. Use of name of denominational college in connection with dance hall.
- 14-398. Theft or destruction of property of public libraries, museums, etc.
- 14-399. Placing trash, refuse, etc., within one hundred and fifty yards of hard-surfaced highway.
- 14-400. Tattooing prohibited.
- 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.
- 14-401.1. Misdemeanor to tamper with examination questions.
- 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.
- 14-401.3. Inscription on gravestone or monument charging commission of crime.
- 14-401.4. Identifying marks on machines and apparatus; application to Department of Motor Vehicles for numbers.

Sec.

- 14-401.5. Practice of phrenology, palmistry, fortune telling or clairvoyance prohibited.
- 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

Article 53.

Sale of Weapons.

- 14-402. Sale of certain weapons without permit forbidden.
- 14-403. Permit issued by clerk of court; form of permit.
- 14-404. Applicant must be of good moral character; weapon for defense of home; clerk's fee.
- 14-405. Record of permits kept by clerk.
- 14-406. Dealer to keep record of sales.
- 14-407. Weapons to be listed for taxes.
- 14-408. Violation of sections 14-406 or 14-407 a misdemeanor.
- 14-409. Machine guns and other like weapons.

Article 54.

Sale, etc., of Pyrotechnics.

- 14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.
- 14-411. Sale deemed made at site of delivery.
- 14-412. Possession prima facie evidence of violation.
- 14-413. Permits for use at public exhibitions.
- 14-414. Pyrotechnics defined; exceptions.
- 14-415. Violation made misdemeanor.

Article 55.

Handling of Poisonous Reptiles.

- 14-416. Handling of poisonous reptiles declared public nuisance and criminal offense.
- 14-417. Regulation of ownership or use of poisonous reptiles.
- 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.
- 14-419. Investigation of suspected violations; seizure and examination of reptiles; destruction or return of reptiles.
- 14-420. Arrest of persons violating provisions of article.
- 14-421. Exemptions from provisions of article.
- 14-422. Violation made misdemeanor.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. **Felonies and misdemeanors defined.**—A felony is a crime which is or may be punishable by either death or imprisonment in the State's prison. Any other crime is a misdemeanor. (1891, c. 205, s. 1; Rev., s. 3291; C. S., s. 4171.)

Cross Reference.—As to statute of limitations for misdemeanors, see § 15-1.

Common-Law Provisions. — Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, and what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651 (1899); *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910). See *State v. Hill*, 91 N. C. 561 (1884).

For article on punishment for crime in North Carolina, see 17 N. C. Law Rev. 205.

Section Constitutional. — This section is held to be constitutional in *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905).

Punishment Determines Classification of Offenses.—By this section, North Carolina adopted the rule, now almost universally prevalent, by which the nature of the punishment determines the classification of offenses; those which may be punished capitally or by imprisonment in the penitentiary are felonies (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651 (1899).

The measure of punishment is the test of the nature of a crime, whether felony or misdemeanor. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284 (1913); *Jones v. Brinkley*, 174 N. C. 23, 93 S. E. 372 (1917).

It should be noted that there are exceptions to this general rule. The legislature has the power to style any offense a misdemeanor, notwithstanding it is punishable in the State's prison. Examples of this appear in §§ 14-278, 14-280 and 44-25 where the offenses are specifically declared to be misdemeanors although they are punishable in the State's prison. See *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910). See also Editor's Note under § 14-3.

Offense Need Not Be Specified.—It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906).

Indictment Must Use Word "Felony."—Since all criminal offenses punishable with death or imprisonment in a State prison were by this section declared felonies, indictments wherein there has been a failure to use the word "feloniously," as characterizing the charge in the latter class of cases, have been declared fatally defective. *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63 (1891); *State v. Bryan*, 112 N. C. 848, 16 S. E. 909 (1893); *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010 (1893); *State v. Wilson*, 116 N. C. 979, 21 S. E. 692 (1895); *State v. Shaw*, 117 N. C. 764, 23 S. E. 246 (1895); *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910). See *State v. Callett*, 211 N. C. 563, 191 S. E. 27 (1937). But this principle does not hold good where the legislature otherwise expressly provides.

In § 15-145 the legislature has prescribed a form of indictment for perjury (which is by § 14-209 a felony) and left out the word "feloniously." And in *State v. Harris*, 145 N. C. 456, 59 S. E. 115 (1907) the court held that in the case of perjury it was unnecessary that the word appear. See *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910).

Same—New Bill Obtained.—But the bill should not be quashed; the defendant should be held until a new bill is obtained. *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63 (1891).

Penitentiary Unknown to Common Law.—The penitentiary, being a modern device, unknown to the common law, punishment in the penitentiary could not be imposed by the common law. *State v. McNeill*, 75 N. C. 15 (1876).

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57 (1922).

Concurrence of General and Local Laws.—Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local

or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder is guilty of a felony, by this section, and the two-year statute of limitations is not a bar to the prosecution. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57 (1922).

Thus in the case of a public-local law the fact that the offense is declared a misdemeanor does not govern where the punishment prescribed is confinement in the State prison. In such cases, by this section the offense is a felony. See above

§ 14-2. Punishment of felonies.—Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or State prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or State prison not less than four months nor more than ten years, or be fined. (R. C., c. 34, s. 27; Code, s. 1096; Rev., s. 3292; C. S., s. 4172.)

In General.—It is only felonies where no specific punishment is prescribed, and offenses that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, that may be punished with imprisonment in the penitentiary. *State v. Powell*, 94 N. C. 920 (1886). See Editor's Note under § 14-3.

Where Section Applies.—This section applies only where an act is made a felony without the nature of punishment being specified. *State v. Rippey*, 127 N. C. 516, 37 S. E. 148 (1900).

Specific Punishment.—A provision in a criminal statute "that the punishment shall be in the discretion of the court and the defendant may be fined or imprisoned or

catchline "Punishment Determines Classification of Offenses."—Ed. Note.

Conspiracy.—A conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor. *State v. Abernethy*, 220 N. C. 226, 17 S. E. (2d) 25 (1941), holding that a conspiracy to interfere with election officials in the discharge of their duties is a misdemeanor.

An assault with intent to commit rape is a felony. *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458 (1944).

Applied in *State v. Johnson*, 227 N. C. 587, 42 S. E. (2d) 685 (1947).

Cited in *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943); *State v. Bently*, 223 N. C. 563, 27 S. E. (2d) 738 (1943) (con. op.); *State v. Mounce*, 226 N. C. 159, 36 S. E. (2d) 918 (1946).

both," is the prescribing of a "specific punishment" within this section. *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863 (1942).

The felony defined in § 14-26 is not one "for which no specific punishment is prescribed," within this section. The punishment is expressly left to the discretion of the court, which takes the case out of this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417 (1925). See further under § 14-3, catchline "Meaning of Specific Punishment."

Cited in *State v. Ritter*, 199 N. C. 116, 154 S. E. 62 (1930); *State v. Mounce*, 226 N. C. 159, 36 S. E. (2d) 918 (1946).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, etc.—All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or State prison for not less than four months nor more than ten years, or shall be fined. (R. C., c. 34, s. 120; Code, s. 1097; Rev., s. 3293; C. S., s. 4173; 1927, c. 1.)

Cross References.—As to uttering worthless check, see §§ 14-106 and 14-107. As to statute of limitations for misdemeanors, see § 15-1.

Editor's Note.—The 1927 amendment changed this section by inserting the words "or State prison."

Interpreting, then, this addition to § 14-3, in connection with § 14-1, it makes the particular offense in the instant case, having been done in secrecy and malice, distinctly a felony. That section is not defining offenses, but providing punishment for them and it, therefore, sets aside, as the neces-

sary effect of the amendment, the offenses in the latter clause as felonies to be punished by imprisonment in the State's prison. Consequently properly interpreted, this amendment of 1927 creates a conspiracy formed in secrecy and in malice, a felony, which, using the words in § 14-1, may be punishable by imprisonment in State's prison. *State v. Ritter*, 199 N. C. 116, 154 S. E. 62 (1930).

Infamous Offense. — A statute, which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, and not to the measure of punishment. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

For lack of clear test as to what constitutes infamous offense, see 28 N. C. Law Rev. 103.

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, under this section, and is a felony. *State v. Harwood*, 206 N. C. 87, 173 S. E. 24 (1934).

When Section Applies.—This section applies only where an act is prohibited or is made unlawful, without the nature of the punishment being specified. *State v. Rippey*, 127 N. C. 516, 37 S. E. 148 (1900).

If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, notwithstanding the fact that no punishment is prescribed in the statute. *State v. Bloodworth*, 94 N. C. 918 (1886).

Meaning of Specific Punishment.—It can not be said that all the crimes in the Code fall within the scope of this and the preceding sections, because "no specific punishment" is prescribed. The punishment is specific (i. e., specified as fine, or imprisonment in jail or in State's prison), though the extent of the specified punishment is left in the discretion of the court, or in its discretion not exceeding a limit stated. *State v. Rippey*, 127 N. C. 516, 37 S. E. 148 (1900).

Same — Assault Not Punishable under

Section. — Upon the ruling in *State v. Rippey*, 127 N. C. 516, 37 S. E. 148 (1900), § 14-33, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of this section, and entirely withdraws the case of assault from the operation of this section. *State v. Smith*, 174 N. C. 804, 93 S. E. 910 (1917).

Common-Law Punishment.—Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both. *State v. McNeill*, 75 N. C. 15 (1876); *State v. Powell*, 94 N. C. 920 (1886).

Fornication and Adultery.—Persons convicted of fornication and adultery may be imprisoned in the common jail for a period to be fixed in the discretion of the court. *State v. Manly*, 95 N. C. 661 (1886).

Conspiracy to Charge with Infanticide.—A conspiracy to charge one with infanticide, being only a common-law misdemeanor, is not punishable by imprisonment in the penitentiary. *State v. Jackson*, 82 N. C. 565 (1880).

Receiving Stolen Goods.—Although the offense of receiving stolen goods is declared to be a misdemeanor by § 14-71, the same section authorizes the court to punish the offense in the same manner as larceny is punished; that is, confinement in the State's prison or county jail for not less than four months, nor more than ten years. *State v. Brite*, 73 N. C. 26 (1875).

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the State prison for a term not in excess of ten years, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

Attempt to Commit Crime against Nature.—While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the State's prison, and is made a felony by this section, and an attempt to commit the crime against nature is infamous and is punishable by imprisonment in the State's prison as a felony within the definition of this section. *State v. Spivey*, 213 N. C. 45, 195 S. E. 1 (1938).

What Amounts to Confession of Felony.—A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and

assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, is a confession of a felony under this section, although § 14-76 designates such offense as a misdemeanor. *State v. Harwood*, 206 N. C. 87, 173 S. E. 24 (1934).

Discretion of Trial Judge. — Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. *State v. Willer*, 94 N. C. 904 (1886); *State v. Smith*, 174 N. C. 804, 93 S. E. 910 (1917).

Excessive Punishment. — The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. And so where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine and imprison. *State v. Walters*, 97 N. C. 489, 2 S. E. 539 (1887).

In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was thirty-four years of age, and also, that the assault was aggravated, shocking and outrageous, the accepted plea is for a misdemeanor under § 14-33, and judgment that the defendant be confined to the State's prison for not less than eight nor more than ten years, is a violation of N. C. Const., Art. I, § 14, and this section. *State v. Tyson*, 223 N. C. 492, 27 S. E. (2d) 113 (1943).

Same—Example. — A sentence of imprisonment for five years in the county jail and a recognizance of \$500 to keep the peace for five years after the expiration thereof

upon a defendant convicted of assault and battery, is excessive and therefore unconstitutional. *State v. Driver*, 78 N. C. 423 (1878).

Same — Two Years Not Cruel or Unusual. — It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. *State v. Driver*, 78 N. C. 423 (1878); *State v. Miller*, 94 N. C. 904 (1886); *State v. Farrington*, 141 N. C. 844, 53 S. E. 954 (1906).

Effect of Consent of Defendant. — No consent of the defendant can confer a jurisdiction which is denied to the court by the law, and any punishment imposed, other than that prescribed for the offense, is illegal. *In re Schenck*, 74 N. C. 607 (1876).

Where Common-Law Offense Altered by Statute. — Where the grade of a common-law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law. *State v. Lawrence*, 81 N. C. 522 (1879).

Where Statute Repealed before Judgment. — Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed. *State v. Cress*, 49 N. C. 421 (1857); *State v. Nutt*, 61 N. C. 20 (1866); *State v. Long*, 78 N. C. 571 (1878); *State v. Massey*, 103 N. C. 356, 9 S. E. 632 (1889); *State v. Biggers*, 108 N. C. 760, 12 S. E. 1024 (1891); *State v. Perkins*, 141 N. C. 797, 53 S. E. 735 (1906).

Applied in *State v. Mounce*, 226 N. C. 159, 36 S. E. (2d) 918 (1946).

Cited in *State v. Wilson*, 216 N. C. 130, 4 S. E. (2d) 440 (1939); *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475 (1941); *State v. Perry*, 225 N. C. 174, 33 S. E. (2d) 569 (1945).

§ 14-4. Violation of town ordinance misdemeanor; punishment. — If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1871-2, c. 195, s. 2; Code, s. 3820; Rev., s. 3702; C. S., s. 4174.)

Cross Reference. — As to ordinances, see § 160-52 et seq.

In General. — While the town or city government has no right to make criminal law, the legislature has made the violation of ordinances a criminal offense. *Board v. Henderson*, 126 N. C. 689, 36 S. E. 158 (1900); *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473 (1900).

Prior to Section Violation Not Punishable. — Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. *State v. Parker*, 75 N. C. 249 (1876); *School Directors v. Asheville*, 137 N. C. 503, 50 S. E. 279 (1905).

Jurisdiction. — The mayor, or other chief

officer of towns or cities, has jurisdiction of offenses under this section. *State v. Wood*, 94 N. C. 855 (1886); *State v. Cainan*, 94 N. C. 880 (1886); *State v. Smith*, 103 N. C. 403, 9 S. E. 435 (1889).

Same—Concurrent with Justice.—A justice of the peace has concurrent jurisdiction with the mayor of a city or town, of violation of ordinances, which are made misdemeanors. *State v. Cainan*, 94 N. C. 880 (1886).

Same—Superior Court Excluded.—The superior court has no original jurisdiction to try indictments for violation of town ordinances. *State v. White*, 76 N. C. 15 (1877); *State v. Threadgill*, 76 N. C. 17 (1877).

Ordinance Must Conform to State Law.—It is uniformly held that a town ordinance in violation of a valid State statute appertaining to the question is void. *Shaw v. Kennedy*, 4 N. C. 591 (1817); *State v. Austin*, 114 N. C. 855, 19 S. E. 919 (1894); *State v. Beacham*, 125 N. C. 652, 34 S. E. 447 (1899); *State v. Prevo*, 178 N. C. 740, 101 S. E. 370 (1919).

Violation of Invalid Ordinance No Offense.—The violation of a valid ordinance is, under the provision of this section, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. *State v. Hunter*, 106 N. C. 796, 11 S. E. 366 (1890); *State v. Webber*, 107 N. C. 962, 12 S. E. 598 (1890).

Failure to Prescribe Penalty.—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. *State v. Razook*, 179 N. C. 708, 103 S. E. 67 (1920).

Where Fine Provided It Must Be Certain.—An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. *State v. Irvin*, 126 N. C. 989, 35 S. E. 430 (1900).

Provision in Ordinance for Arrest Void.—When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be “arrested and fined twenty-five dollars upon conviction thereof,” it was held that so much of the ordinance as provided for the arrest was void, but the other provisions were valid. *State v. Earhardt*, 107 N. C. 789, 12 S. E. 426 (1890).

Personal Notice to Offender Sufficient.—The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring such ordinances to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits

the offense prohibited, the requirement of publication, etc., is not necessary for a conviction. *State v. Razook*, 179 N. C. 708, 103 S. E. 67 (1920).

State Must Show Violation of Valid Ordinance.—Upon the prosecution of a criminal action for the violation of a city ordinance, under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. *State v. Hunter*, 106 N. C. 796, 11 S. E. 366 (1890); *State v. Snipes*, 161 N. C. 242, 76 S. E. 243 (1912); *State v. Prevo*, 178 N. C. 740, 101 S. E. 370 (1919).

And where the State fails to show that the original act of incorporation authorized the enactment of an ordinance, it fails to make out the case, for the legislature never intended to make the violation of a void ordinance an indictable misdemeanor. *State v. Threadgill*, 76 N. C. 17 (1877).

Defects in Warrant May Be Waived.—Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. *State v. Prevo*, 178 N. C. 740, 101 S. E. 370 (1919).

Form of Indictment.—It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. *State v. Merritt*, 83 N. C. 677 (1880); *State v. Cainan*, 94 N. C. 880 (1886).

In an indictment under an ordinance for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. *State v. Cainan*, 94 N. C. 880 (1886).

No Removal under § 7-147.—In a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal, under § 7-147. *State v. Joyner*, 127 N. C. 541, 37 S. E. 201 (1900).

Costs of Prosecutions under Section.—Whether the criminal offenses created by the violation of town ordinances under this section are tried before the mayor, or before a justice of the peace, they are State prosecutions, in the name of the State, or for violation of the criminal law of the State, and at the expense of the State (*State v. Higgs*, 126 N. C. 1014, 35 S. E. 473 (1900)), and the city cannot be charged with the costs of such prosecutions. *Board v. Henderson*, 126 N. C. 689, 36 S. E. 158 (1900).

Conviction for Fighting No Bar to Prosecution for Assault.—A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the

town by fighting is not a bar to a prosecution by the State for an assault. *State v. Taylor*, 133 N. C. 755, 46 S. E. 5 (1903).

ARTICLE 2.

Principals and Accessories.

§ 14-5. **Accessories before the fact; trial and punishment.**—If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. The offense of the person so counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the State. In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of any other county, the last mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense. (1797, c. 485, s. 1, P. R.; 1852, c. 58; R. C., c. 34, s. 53; Code, s. 977; Rev., s. 3287; C. S., s. 4175.)

In General.—It is a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. *State v. Simmons*, 51 N. C. 21 (1858).

Common-Law Provision.—At common law an accessory before the fact could only be convicted when tried at the same time with the principal, and after conviction of the principal, or after the principal had been tried, convicted and sentenced. *State v. Duncan*, 28 N. C. 98 (1845); *State v. Jones*, 101 N. C. 719, 8 S. E. 147 (1888).

But the rule that an accessory could not be tried and convicted before the principal had no application as between two principals in first and second degrees. *State v. Jarrell*, 141 N. C. 722, 53 S. E. 137 (1906).

"Accessory before Fact" Is a Substantive Felony.—This section made the facts which formerly had been called "accessory before the fact" a substantive felony (whether in murder or any other felony). *State v. Bryson*, 173 N. C. 803, 92 S. E.

698 (1917).

Prior Conviction of Principals Unnecessary.—Under the provisions of this section it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. *State v. Jones*, 101 N. C. 719, 8 S. E. 147 (1888); *State v. Walton*, 186 N. C. 485, 119 S. E. 886 (1923).

One indicted as accessory before the fact can not complain that his cause was tried before that of the alleged principal, and before the alleged principal had even been called on to plead. *State v. Reid*, 178 N. C. 745, 101 S. E. 104 (1919).

Same—What Indictment Must Aver.—Where the principal felon is not amenable to the process of the law, it is necessary to aver that in the indictment. *State v. Groff*, 5 N. C. 270 (1809); *State v. Ives*, 35 N. C. 338 (1852).

Who Are Principals.—All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are

principals in the crime. *State v. Gaston*, 73 N. C. 93 (1875); *State v. Jarrell*, 141 N. C. 722, 53 S. E. 127 (1906).

Same—Second Degree.—Persons present assisting in doing a criminal act are principals in the second degree, not accessories. *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910); *State v. Skeen*, 182 N. C. 844, 109 S. E. 71 (1921).

In Misdemeanors All Are Principals.—In a misdemeanor all aiders, abettors, and accessories, whether before or after the fact, are principals. *State v. Barden*, 12 N. C. 518 (1828); *State v. Cheek*, 35 N. C. 114 (1851); *State v. De Boy*, 117 N. C. 702, 23 S. E. 167 (1895); *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910); *State v. Grier*, 184 N. C. 723, 114 S. E. 622 (1922). For an example of "first degree" and "second degree" in misdemeanors, see § 14-207.

Accessory Tried as Principal.—An accessory before the fact can be tried and convicted as principal, under this section. *State v. Bryson*, 173 N. C. 803, 92 S. E. 698 (1917).

One Charged with Murder May Be Convicted as Accessory.—Under § 15-170 the charge of the principal crime includes the crime of accessory before the fact and hence one charged with murder may be convicted as accessory before the fact. *State v. Bryson*, 173 N. C. 803, 92 S. E. 698 (1917), overruling on this point *State v. Denver*, 65 N. C. 572 (1871). See also *State v. Simons*, 179 N. C. 700, 103 S. E. 5 (1920).

Principal in Assault Cannot Be Convicted as Accessory.—A defendant charged as principal in an indictment for an assault with intent to kill can not be convicted as accessory. *State v. Green*, 119 N. C. 899, 26 S. E. 112 (1896).

No Conviction of Accessory Where Principal Acquitted.—This section does not change the common-law rule that an acquittal of the principal is an acquittal of the accessory. *State v. Jones*, 101 N. C. 719, 8 S. E. 147 (1888).

Effect of Acquittal of One of Several Principals.—Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. *State v. Walton*, 186 N. C. 485, 119 S. E. 886 (1923).

Accessory Tried by Special Veniremen.—Where two persons are indicted for

murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. *State v. Register*, 133 N. C. 746, 46 S. E. 21 (1903).

What Constitutes Counseling, Procuring and Commanding.—At a meeting of a board of commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within sixty days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. And, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said: "The way is open, go ahead and remove them." It was held, that the mayor was individually guilty of counseling, procuring and commanding an act within the meaning of this section, the committing of which afterwards was a felony. *State v. McLean*, 121 N. C. 589, 28 S. E. 140 (1897).

The meaning of the word "command," as applied to the case of principal and accessory, is, where a person, having a control over another, as a master over his servant, orders a thing to be done. *State v. Mann*, 2 N. C. 4 (1791).

One Present Not Bound to Interfere.—One who is present, and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. *State v. Hildreth*, 31 N. C. 440 (1849).

Evidence Admissible.—The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal, and prima facie evidence of his guilt. *State v. Chitem*, 13 N. C. 49 (1828).

But the conviction of the principal is not admissible evidence until judgment has been rendered on the verdict. *State v. Duncan*, 28 N. C. 98 (1845).

Same—Sufficient for Conviction.—Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. *State v. Jones*, 176 N. C. 702, 97 S. E. 32 (1918).

Sufficient Evidence to Submit Question to Jury.—Evidence tending to show that defendant knew of and participated in the plans or preparations made for the killing of deceased, that defendant procured a

coat for the killer and furnished an automobile as a means of flight after the murder had been committed is held sufficient to be submitted to the jury on an indictment drawn under this section. *State v. Williams*, 208 N. C. 707, 182 S. E. 131 (1935).

Applied in *State v. Holland*, 211 N. C.

284, 189 S. E. 761 (1937).

Cited in *State v. Ferrell*, 205 N. C. 640, 172 S. E. 186 (1934); *State v. Kluttz*, 206 N. C. 726, 175 S. E. 81 (1934); *State v. Hampton*, 210 N. C. 283, 186 S. E. 251 (1936); *In re Malicord*, 211 N. C. 684, 191 S. E. 730 (1937); *State v. Exum*, 213 N. C. 16, 195 S. E. 7 (1938).

§ 14-6. Punishment of accessories before the fact.—Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life in the State's prison. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned in the State's prison for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact in any other felony shall be punished by imprisonment in the State prison or county jail for not more than ten years, or may be fined in the discretion of the court. (1868-9, c. 31, s. 2; 1874-5, c. 212; Code, s. 980; Rev., s. 3290; C. S., s. 4176.)

Life Sentence for Accessory to Murder Valid.—Upon conviction of murder in the second degree, and sentence to twenty years in the State's prison, upon an indictment for murder, when it appears from the evidence that the accused was only an accessory, the case will not be remanded to the superior court for resentencing, as the statute provides a sentence for life. *State v. Bryson*, 173 N. C. 803, 92 S. E. 698 (1917).

Sufficiency of Evidence to Go to Jury.—

Evidence that defendant, for the purpose of freeing himself of competition in the illegal sale of intoxicating liquors, procured another to kill deceased by shooting him from ambush while lying in wait, is sufficient to be submitted to the jury in a prosecution as an accessory before the fact to the crime of murder under this section. *State v. Mozingo*, 207 N. C. 247, 176 S. E. 582 (1934).

Cited in *State v. Exum*, 213 N. C. 16, 195 S. E. 7 (1938).

§ 14-7. Accessories after the fact; trial and punishment.—If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the State; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense. (1797, c. 485, s. 1, P. R.; 1852, c. 58; R. C., c. 34, s. 54; Code, s. 978; Rev., s. 3289; C. S., s. 4177.)

In General. — See in connection with this section the annotations under § 14-5, many of which apply equally to this section.

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been com-

mitted, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, the person so aided has committed a felony. *State v. Potter*, 221 N. C. 153, 19 S. E. (2d) 257 (1942).

One cannot become an accessory after

the fact until the offense has become an accomplished fact. Thus, a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given but before death ensued, as a murder is not complete until the death results. *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617 (1948).

Receiver of Stolen Goods Not Acces-

sory. — All felonious stealing being now reduced by § 14-70 to the grade of petit larceny, a receiver of stolen goods is not an accessory after the fact. *State v. Tyler*, 85 N. C. 569 (1881).

Husband of Accessory Not Competent Witness.—The husband of one charged as an accessory is not a competent witness in favor of the one charged as the principal felon. *State v. Ludwick*, 61 N. C. 401 (1868).

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

ARTICLE 3.

Rebellion.

§ 14-8. **Rebellion against the State.**—If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the State of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and, shall be punished by imprisonment in the State's prison for not more than fifteen years and by a fine of not more than ten thousand dollars. (Const., art. 4, s. 5; 1861, c. 18; 1866, c. 64; 1868, c. 60, s. 2; Code, s. 1106; Rev., s. 3437; C. S., s. 4178.)

§ 14-9. **Conspiring to rebel against the State.**—If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the State, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the State, or by force or fraud to seize or take possession of any firearms or other property of the State, against the will or contrary to the authority of such State, every person so offending in any of the ways aforesaid shall be guilty of a felony and shall be imprisoned not more than ten years in the State's prison and be fined not exceeding five thousand dollars. (1868, c. 60, s. 1; Code, s. 1107; Rev., s. 3438; C. S., s. 4179.)

In General. — It is a rule well established that all who engage in a conspiracy, as well as those who participate after it is formed, are equally liable, and the acts

and declarations of each in furtherance of the common illegal design are admissible against all. *State v. Jackson*, 82 N. C. 565 (1880).

§ 14-10. **Secret political and military organizations forbidden.**—If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extra-judicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extra-judicial oath or other secret,

solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court. (1868-9, c. 267; 1870-1, c. 133; 1871-2, c. 143; Code, s. 1095; Rev., s. 3439; C. S., s. 4180.)

Cited in *State v. Pelley*, 221 N. C. 487,
20 S. E. (2d) 850 (1942).

ARTICLE 4.

Subversive Activities.

§ 14-11. Activities aimed at overthrow of government; use of public buildings.—It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the State, owned by the State of North Carolina, any political subdivision thereof, or by any department or agency of the State or any institution supported in whole or in part by State funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means. (1941, c. 37, s. 1.)

For comment on this section, see 19 N.
C. Law Rev. 466.

§ 14-12. Punishment for violations.—Any person or persons violating any of the provisions of this article shall, for the first offense, be guilty of a misdemeanor and be punished accordingly, and for the second offense shall be guilty of a felony and punished accordingly. (1941, c. 37, s. 2.)

§ 14-12.1. Certain subversive activities made unlawful.—It shall be unlawful for any person to:

1. By word of mouth or writing advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning the government of the United States or a political subdivision of the United States by force or violence; or,

2. Print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means; or,

3. Organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means.

Any person violating the provisions of this section shall be guilty of a felony and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful

means, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or investigation, shall be guilty of a felony and punishable by a fine or imprisonment, or both in the discretion of the court.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known.

No person shall be employed by any department, bureau, institution or agency of the State of North Carolina who has participated in any of the activities described in this section, and any person now employed by any department, bureau, institution or agency and who has been or is engaged in any of the activities described in this section shall be forthwith discharged. Evidence satisfactory to the head of such department, bureau, institution or agency of the State shall be sufficient for refusal to employ any person or cause for discharge of any employee for the reasons set forth in this paragraph. (1947, c. 1028.)

Editor's Note.—It seems that the word "investigation" in the third paragraph from the end of the section was inserted by inadvertence instead of "instigation", which was probably intended.

ARTICLE 5.

Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.

—If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the State; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the State from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years. (1811, c. 814, s. 3, P. R.; R. C., c. 34, s. 64; Code, s. 1035; Rev., s. 3422; C. S., s. 4181.)

Cross References.—As to forgery, see § 14-119 et seq. As to counterfeiting trademarks, see § 80-8.

§ 14-14. Possessing tools for counterfeiting.—If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the State, and shall be duly convicted thereof, the person so offending shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years, or be fined not more than five hundred dollars. (1811, c. 814, s. 4, P. R.; R. C., c. 34, s. 65; Code, s. 1036; Rev., s. 3423; C. S., s. 4182.)

Indictment Sufficient. — An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the

purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offense designated in this section. *State v. Collins*, 10 N. C. 191 (1824).

§ 14-15. Issuing substitutes for money without authority.—If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars; and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor. (R. C., c. 36, s. 5; Code, s. 2493; 1895, c. 127; Rev., s. 3711; C. S., s. 4183.)

Local Modification.—Cumberland: 1933, c. 33; Currituck: 1933, c. 328.

Editor's Note.—In *State v. Humphreys*, 19 N. C. 555 (1837), the act of 1816, ch. 900, which was very similar to this sec-

tion, is discussed. It is there held that the act is constitutional and that the intent in so issuing the notes, etc., is an essential ingredient of the offense.

§ 14-16. Receiving or passing unauthorized substitutes for money.—If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in § 14-15, whether the same be issued within or without the State, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor. (R. C., c. 36, s. 6; Code, s. 2494; 1895, c. 127; Rev., s. 3712; C. S., s. 4184.)

Editor's Note.—In *State v. Bank*, 48 N. C. 450 (1856), it was held that this section making it an offense to "pass and receive" banknotes, did not apply to a bank but

that the bank should be penalized under another section which made it unlawful to make and issue notes of a less denomination than three dollars.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. (1893, cc. 85, 281; Rev., s. 3631; C. S., s. 4200; 1949, c. 299, s. 1.)

- I. In General.
- II. Murder in General.
- III. Murder in the First Degree.
- IV. Murder in the Second Degree.
- V. Pleading and Practice.

Cross References.

As to accomplices, see § 14-5 et seq. As to assault in this State, but death in another, see § 15-131.

I. IN GENERAL.

Editor's Note. — The 1949 amendment rewrote this section and inserted the pro-

viso to the first sentence. For brief comment on amendment, see 27 N. C. Law Rev. 449.

The statutes where murder is divided into two degrees have not, as a general rule, added to or taken away any ingredient of murder at common law, and every murder at common law is murder under the statutes. See *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128 (1899); *State v. Delton*, 178 N. C. 779, 101 S. E. 548 (1919); *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649 (1949).

For a brief history of this section in connection with sufficiency of indictment for murder in the first degree, see *State v. Kirksey*, 227 N. C. 445, 42 S. E. (2d) 613 (1947).

II. MURDER IN GENERAL.

Effect of Section Dividing Murder into Degrees.—This section, dividing murder into two degrees, does not give any new definition of murder, but the same remains as it was at common law before the enactment. *State v. Delton*, 178 N. C. 779, 101 S. E. 548 (1919).

Purpose.—This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders deemed less heinous as murder in the second degree, punished by imprisonment. *State v. Smith*, 221 N. C. 278, 20 S. E. (2d) 313 (1942).

Principal May Be Prosecuted under This Section and Accessory under § 14-6.

—Section 14-6 prescribing imprisonment for life upon a conviction as an accessory before the fact to the crime of murder was in force at the time this section was enacted and the principal may therefore be convicted and punished under this section for murder in the second degree, while the accessory before the fact receives life under § 14-6. *State v. Mozingo*, 207 N. C. 247, 176 S. E. 582 (1934).

Malice—Definition.—Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. *State v. Benson*, 183 N. C. 795, 111 S. E. 869 (1922).

Same—Necessity.—Malice is always a necessary ingredient of murder. *State v. Baldwin*, 152 N. C. 822, 68 S. E. 148 (1910).

Same—Express.—But it is not necessary to a conviction for murder that the State prove express malice. *State v. McDowell*, 145 N. C. 563, 59 S. E. 690 (1907).

Same—Implied.—For this intentional killing of a human being with a deadly weapon implies malice. *State v. McDowell*, 145 N. C. 563, 59 S. E. 690 (1907); *State v. Brinkley*, 183 N. C. 720, 110 S. E. 783 (1922); *State v. Pasour*, 183 N. C. 793, 111 S. E. 779 (1922).

Same—Presumption.—At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts. *State v. Rhyne*, 124

N. C. 847, 33 S. E. 128 (1899). The common-law rule has been followed and it is now also presumed that a killing with a deadly weapon is unlawful and malicious. *State v. Benson*, 183 N. C. 795, 111 S. E. 869 (1922); *State v. Walker*, 193 N. C. 489, 137 S. E. 429 (1927).

If the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. *State v. Johnson*, 172 N. C. 920, 90 S. E. 426 (1916).

Provocation never disproves malice; it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. *State v. Johnson*, 23 N. C. 354 (1840).

Motive—Necessity.—It is not necessary to a conviction of murder that the State prove motive. *State v. Adams*, 136 N. C. 617, 48 S. E. 589 (1904); *State v. McDowell*, 145 N. C. 563, 59 S. E. 690 (1907).

Same—To Strengthen State's Case.—But the case of the State may be strengthened by the showing of a motive when the evidence is circumstantial. *State v. Turner*, 143 N. C. 641, 57 S. E. 158 (1907); *State v. Stratford*, 149 N. C. 483, 62 S. E. 882 (1908).

Same—To Identify Prisoner or Establish Malice.—And it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. *State v. Adams*, 138 N. C. 688, 50 S. E. 765 (1905); *State v. Wilkins*, 158 N. C. 603, 73 S. E. 992 (1912).

Intent — Necessity.—Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown. Sometimes the intent may be imputed by reason of the killing with a deadly weapon, or by circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. *State v. Stitt*, 146 N. C. 643, 61 S. E. 566 (1908).

Same—Must Co-exist with Killing.—“The act of killing, and the guilty intent, must concur to constitute the offense.” *State v. Scates*, 50 N. C. 420 (1858).

Attempt to Kill.—“An attempt only, to kill, with the most diabolical intent, may be moral, but can not be legal, murder.” *State v. Scates*, 50 N. C. 420 (1858).

Applied in State v. Hodgins, 210 N. C. 371, 186 S. E. 495 (1936); *State v. Montgomery*, 227 N. C. 100, 40 S. E. (2d) 614 (1946); *State v. Lampkin*, 227 N. C. 620, 44 S. E. (2d) 30 (1947); *State v. Par-*

rott, 228 N. C. 752, 46 S. E. (2d) 851 (1948).

Quoted in *State v. Hudson*, 218 N. C. 219, 10 S. E. (2d) 730 (1940).

Cited in *State v. Evans*, 198 N. C. 82, 150 S. E. 678 (1929); *State v. Macon*, 198 N. C. 483, 152 S. E. 407 (1930); *State v. Cooper*, 205 N. C. 657, 172 S. E. 199 (1934); *State v. Beard*, 207 N. C. 673, 178 S. E. 242 (1935); *State v. Horne*, 209 N. C. 725, 184 S. E. 470 (1936); *State v. Linney*, 212 N. C. 739, 194 S. E. 470 (1938); *State v. Blue*, 219 N. C. 612, 14 S. E. (2d) 635 (1941); *State v. Gause*, 227 N. C. 26, 40 S. E. (2d) 463 (1946); *State v. Ewing*, 227 N. C. 107, 40 S. E. (2d) 600 (1946); *Fuquay v. Fuquay*, 232 N. C. 692, 62 S. E. (2d) 83 (1950); *State v. Hall*, 233 N. C. 310, 63 S. E. (2d) 636 (1951).

III. MURDER IN THE FIRST DEGREE.

Effect of Statute Dividing Murder into Degrees.—By the act of 1893, chapter 85 (this section), the crime of murder has been divided into two degrees, first and second. The common-law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree—the killing must be wilful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. *State v. Rhyne*, 124 N. C. 847, 33 S. E. 128 (1899).

Definition.—Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Starnes*, 220 N. C. 384, 17 S. E. (2d) 346 (1941); *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949); *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950).

This section does not give any new definition of murder, but permits that to remain as it was at common law. The section simply selects out of all murders denounced by common law those deemed more heinous on account of the mode of their perpetration, classifies them as murder in the first degree, and provides a greater punishment for them than that prescribed for "all other kinds of murder," which it denominates murder in the second degree. *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649 (1949).

Death Sentence Is Mandatory. — Upon conviction of murder in the first degree the law commands the sentence of death. *State v. Nash*, 226 N. C. 608, 39 S. E. (2d)

596 (1946); *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Unless Jury Recommends Life Imprisonment. — The 1949 amendment inserted the proviso relating to life imprisonment. See 27 N. C. Law Rev. 449.

Deliberation and Premeditation — Premeditation.—Premeditation means thought of beforehand, for some length of time, however short. *State v. Benson*, 183 N. C. 795, 111 S. E. 869 (1922); *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949); *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950). It is a prior determination to do the act. *State v. Cameron*, 166 N. C. 379, 81 S. E. 748 (1914); *State v. Bowser*, 214 N. C. 249, 199 S. E. 31 (1938).

Same — Deliberation. — Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. *State v. Benson*, 183 N. C. 795, 111 S. E. 869 (1922); *State v. Bowser*, 214 N. C. 249, 199 S. E. 31 (1938); *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949); *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950).

Same—Necessity.—And before a conviction for murder in the first degree can be had, the State must show that the prisoner had formed, prior to the killing, with deliberation and premeditation, a purpose to kill deceased. *State v. Terry*, 173 N. C. 761, 92 S. E. 154 (1917); *State v. Benson*, 183 N. C. 795, 111 S. E. 869 (1922). See also 5 N. C. Law Rev. 364.

Same—Length of Time Immaterial. — The killing of a human being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree. *State v. Walker*, 173 N. C. 780, 92 S. E. 327 (1917). No particular period of time is necessary to constitute premeditation and deliberation for a conviction of murder in the first degree under this section. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. *State v. Cogey*, 174 N. C. 814, 94 S. E. 416 (1917); *State v. Holdsclaw*, 180 N. C. 731, 105 S. E. 181 (1920). And deliberation and premeditation need not

be of any perceptible length of time. *State v. Bynum*, 175 N. C. 777, 95 S. E. 101 (1918); *State v. Burney*, 215 N. C. 598, 3 S. E. (2d) 24 (1939); *State v. Hammonds*, 216 N. C. 67, 4 S. E. (2d) 439 (1939).

Same—Sufficiency.—Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722 (1896).

Same—Willful. — For a conviction of murder in the first degree the killing must be done with willful premeditation and determination. *State v. McKay*, 150 N. C. 813, 63 S. E. 1059 (1909); *State v. Baldwin*, 152 N. C. 822, 68 S. E. 148 (1910).

Same — Presumption and Burden of Proof.—When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. *State v. Dunhean*, 224 N. C. 738, 32 S. E. (2d) 322 (1944).

A murder committed in the perpetration or attempt to perpetrate a robbery or any felony is murder in the first degree, and in such instance the State is not put to proof of premeditation and deliberation. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949).

Premeditation and deliberation necessary to constitute murder in the first degree are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949). See *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950).

Malice.—For a conviction of murder in the first degree the killing must be done with malice aforethought, express or implied. *State v. McKay*, 150 N. C. 813, 63 S. E. 1059 (1909).

But a charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held correct, since "aforethought" as so used does not connote premeditation and deliberation but the pre-existence of malice. *State v. Smith*, 221 N. C. 278, 20 S. E. (2d) 313 (1942).

In criminal prosecution charging murder, failure of the court to use adjective

"aforethought" in defining murder in the first degree, was not error. "Malice aforethought" was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in C. S., 4200, now this section, the term "premeditation and deliberation" is more comprehensive and embraces all that is meant by "aforethought," and more. Therefore, the use of "aforethought" is no longer required. *State v. Hightower*, 226 N. C. 62, 36 S. E. (2d) 649 (1946).

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938).

Formed Design to Take Life. — If the circumstances of the killing show a formed design to take life of deceased, the crime is murder in the first degree. *State v. Walker*, 173 N. C. 780, 92 S. E. 327 (1917); *State v. Cain*, 178 N. C. 724, 100 S. E. 884 (1919).

Lying in Wait.—Defendants who lay in wait and killed deceased from ambush are guilty of murder in first degree. *State v. Wiggins*, 171 N. C. 813, 89 S. E. 58 (1916). See also *State v. Satterfield*, 207 N. C. 118, 176 S. E. 466 (1934); *State v. Mozingo*, 207 N. C. 247, 176 S. E. 582 (1934).

Killing Wrong Person by Mistake. — Where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree, is without error. *State v. Burney*, 215 N. C. 598, 3 S. E. (2d) 24 (1939).

A murder perpetrated by means of poison is murder in the first degree. *State v. Hendrick*, 232 N. C. 447, 61 S. E. (2d) 349 (1950).

In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent. *State v. Hendrick*, 232 N. C. 447, 61 S. E. (2d) 349 (1950).

Killing in Perpetration of Robbery.—A homicide committed in the perpetration of, or in attempt to perpetrate, a robbery will be deemed murder in the first degree. *State v. Lane*, 166 N. C. 333, 81 S. E. 620 (1914). See also *State v. Glover*, 208 N. C. 68, 179 S. E. 6 (1935); *State v. Exum*, 213 N. C. 16, 195 S. E. 7 (1938); *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352 (1944).

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, under this section, and the failure of the trial court to submit the issue of guilty of murder in the second degree is not error. *State v. Donnell*, 202 N. C. 782, 164 S. E. 352 (1932). See also *State v. Brown*, 231 N. C. 152, 56 S. E. (2d) 441 (1949).

Where upon a trial for murder all the evidence and inferences therefrom unquestionably tend to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there is no evidence in mitigation of the offense, the evidence establishes the crime of murder in the first degree under this section, and an instruction to the jury either to convict the defendant of murder in the first degree, or to acquit him is not error. *State v. Myers*, 202 N. C. 351, 162 S. E. 764 (1932).

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, the credibility and probative force of the evidence being for the jury. *State v. Langley*, 204 N. C. 687, 169 S. E. 705 (1933).

Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, as defined by this section, under proper instructions from the court thereon upon conflicting evidence. *State v. Sterling*, 200 N. C. 18, 156 S. E. 96 (1930).

Where murder is committed in the perpetration of a robbery from the person, it is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *State v. Alston*, 215 N. C. 713, 3 S. E. (2d) 11 (1939).

A homicide committed in the perpetration or an attempt to perpetrate a robbery is murder in the first degree, notwith-

standing the absence of any fixed intent to kill or any previous purpose, design or plan. *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533 (1940).

Killing in Perpetration of Rape.—Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. *State v. Mays*, 225 N. C. 486, 35 S. E. (2d) 494 (1945); *State v. King*, 226 N. C. 241, 37 S. E. (2d) 684 (1946).

Death Need Not Be Intended. — It is evident under this section a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not. *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649 (1949).

All Conspirators Are Guilty Regardless of Who Actually Committed Crime. — Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, under this section, and it is immaterial which one of them fired the fatal shot. *State v. Green*, 207 N. C. 369, 177 S. E. 120 (1934); *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533 (1940).

Thus, where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. *State v. Stefanoff*, 206 N. C. 443, 174 S. E. 411 (1934); *State v. Miller*, 219 N. C. 514, 14 S. E. (2d) 522 (1941); *State v. Bennett*, 226 N. C. 82, 36 S. E. (2d) 708 (1946); *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949).

Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. *State v. Bell*, 205 N. C. 225, 171 S. E. 50 (1933).

IV. MURDER IN THE SECOND DEGREE.

Definition.—Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. *State v. Benson*, 183 N. C. 795, 111 S. E. 869 (1922); *State v. Starnes*, 220 N. C. 384, 17 S. E. (2d) 346 (1941).

By this section the crime of murder in the second degree is as at common law.

State v. Smith, 221 N. C. 278, 20 S. E. (2d) 313 (1942).

Effect of Statute Dividing Murder into Degrees.—At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse devolved upon the prisoner. The statute dividing murder into two degrees (under this section) contains no reference to this rule, but the Supreme Court of N. C. in *State v. Fuller*, 114 N. C. 885, 19 S. E. 797 (1894), held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggravate the offense to murder in the first degree, as it was on the prisoner, to reduce it. But this applies only to cases of homicide in which premeditation must be shown and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment or torture. As to these, when intentionally done, the law still raised the presumption of murder in the first degree. But nonetheless if the jury convict of a less offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342 (1906).

Same—Presumption.—Since the act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. *State v. Hicks*, 125 N. C. 636, 34 S. E. 247 (1899).

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. *State v. Miller*, 197 N. C. 445, 149 S. E. 590 (1929); *State v. Floyd*, 226 N. C. 571, 39 S. E. (2d) 598 (1946).

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938); *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Bright*, 215 N. C. 537, 2

S. E. (2d) 541 (1939); *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949); *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950).

A killing with a deadly weapon raises the presumption that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. *State v. Perry*, 209 N. C. 604, 184 S. E. 545 (1936).

Intent Formed Simultaneous with Act of Killing.—Where this intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722 (1896); *State v. Barrett*, 142 N. C. 565, 54 S. E. 856 (1906).

V. PLEADING AND PRACTICE.

Form of Indictment.—Nothing contained in the act of 1893 requires any alteration or modification of the existing form of indictment for murder. Therefore, it is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said act of 1893. *State v. Covington*, 117 N. C. 834, 23 S. E. 337 (1895).

This section does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. *State v. Smith*, 223 N. C. 457, 27 S. E. (2d) 114 (1943).

Remedy for Alternative Indictment Held to Be by Motion for Bill of Particulars.—After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment for that the indictment was alternative, indefinite, and uncertain. It was held that although the indictment was alternative, either charge constituted murder in the first degree under this section, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars under § 15-143. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

Evidence of Premeditation and Deliberation.—In determining the question of premeditation and deliberation, the conduct of defendants, before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent. *State*

v. Chavis, 231 N. C. 307, 56 S. E. (2d) 678 (1949); State v. Lamm, 232 N. C. 402, 61 S. E. (2d) 188 (1950).

Evidence of Killing in Perpetration of Robbery.—Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by this section, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. State v. Westmoreland, 181 N. C. 590, 107 S. E. 438 (1921).

Evidence of Killing in Perpetration of Rape.—In a prosecution for murder in the first degree, testimony that in his voluntary confession defendant stated he entered deceased's house to rape her was competent to show that killing was done in perpetration or attempt to perpetrate rape, which constitutes murder in first degree without proof of premeditation and deliberation. State v. King, 226 N. C. 241, 37 S. E. (2d) 684 (1946).

Evidence of Facts Succeeding Homicide.—Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree. State v. Westmoreland, 181 N. C. 590, 107 S. E. 438 (1921).

Beyond Reasonable Doubt.—The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. State v. Hawkins, 214 N. C. 326, 199 S. E. 284 (1938).

Determination of Degree of Murder.—Under this section, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N. C. 811, 23 S. E. 477 (1895); State v. Truesdale, 123 N. C. 696, 34 S. E. 646 (1898).

Charge—Willful Premeditation and Deliberation.—The law is fixed by the statute, that the killing must be willful, upon premeditation and with deliberation, and

where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in the first degree ought not to be submitted to them. State v. Rhyne, 124 N. C. 847, 33 S. E. 128 (1899).

Same—Burden of Proof of Unlawful Killing.—Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, and in keeping with the language of this section, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation or murder committed in the perpetration, or attempt to perpetrate, other felonies named. State v. Walker, 193 N. C. 489, 137 S. E. 429 (1927).

Same—Sufficiency of Charge.—The court charged fully as to what was reasonable doubt, circumstantial evidence, presumption of innocence, etc. In absence of a request to do so, it was not error for the court to fail to define robbery in detail. State v. Godwin, 216 N. C. 49, 3 S. E. (2d) 347 (1939).

Sufficient Showing of Provocation So as to Reduce the Crime.—A defendant who has intentionally killed another with a deadly weapon, in order to rebut the presumption arising from such showing or admission, must establish to the satisfaction of the jury the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or excuse it altogether, but if there is no evidence of mitigation or provocation sufficient to reduce the offense to manslaughter it is proper to withhold this issue from the jury's consideration. State v. Keaton, 206 N. C. 682, 175 S. E. 296 (1934).

Instructions.—See annotations under § 15-172.

Instruction held reversible error. State v. Clark, 225 N. C. 52, 33 S. E. (2d) 245 (1945).

Evidence Sufficient to Support Instruction as to Murder in First Degree.—Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, is sufficient to support an instruction to the jury on the question of murder in the first degree. State v. Brooks, 206 N. C. 113, 172 S. E. 879 (1934).

Where Jury May Be Instructed to Return First Degree Verdict or Not Guilty.—

It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. *State v. Perry*, 209 N. C. 604, 184 S. E. 545 (1936).

Where there was abundant evidence tending to establish that homicide was committed in the perpetration of capital felony rape, and that defendant was the one who committed the offense, and no element of murder in the second degree or manslaughter was made to appear, court properly limited the possible verdicts to guilty of murder in first degree or not guilty. *State v. Mays*, 225 N. C. 486, 35 S. E. (2d) 494 (1945).

Where all the evidence is to the effect that a murder was committed in the perpetration of a robbery, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty under this section. *State v. Gosnell*, 208 N. C. 401, 181 S. E. 323 (1935).

Where evidence tends to show murder committed in the perpetration of robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limited the jury to verdicts of guilty of murder in the first degree or not guilty. *State v. Matthews*, 226 N. C. 639, 39 S. E. (2d) 819 (1946).

A murder committed in the perpetration or attempted commission of the felony of kidnapping or holding a human being for ransom constitutes murder in the first degree and an instruction to this effect up-

on supporting evidence cannot be held for error. *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649 (1949).

Sufficiency of Evidence for Submission to Jury.—Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and that deceased was killed by a shot from a gun fired from the outside, is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree as stated in this section. *State v. Ferrell*, 205 N. C. 640, 172 S. E. 186 (1934).

Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house, and thereby proximately caused the deaths of the occupants, is sufficient to be submitted to the jury on the charge of murder in the first degree. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery, is sufficient to take the issue of their guilt of murder in the first degree to the jury. *State v. Chavis*, 231 N. C. 307, 56 S. E. (2d) 678 (1949).

Verdict.—For a conviction of murder in the first degree under this section and § 15-172, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under constitutional mandate, Const., Art. I, §§ 13, 17, which right may not be waived. *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927).

§ 14-18. Punishment for manslaughter.—If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both. (4 Hen. VII, c. 13; 1816, c. 918. P. R.; R. C., c. 34, s. 24; 1879, c. 255; Code, s. 1055; Rev., s. 3632; C. S., s. 4201; 1933, c. 249.)

Editor's Note.—The 1933 amendment added the proviso.

As to Less Degrees of Same Crime.—While under the provisions of § 15-170, the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner

is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. *State v. Lutterloh*, 188 N. C. 412, 124 S. E. 752 (1924).

Punishment Not Reviewable on Appeal.—The question of the imposition of a sentence on the prisoner convicted of man-

slaughter within the maximum and minimum allowed by this section, is within the discretion of the trial court and is not reviewable on appeal. *State v. Fleming*, 202 N. C. 512, 163 S. E. 453 (1932).

Section Does Not Constitute Involuntary Manslaughter a Misdemeanor.—The amendment to this section by ch. 249, Public Laws of 1933, which added a proviso that in cases of involuntary manslaughter the defendant shall be punishable by fine or imprisonment, or both, in the discretion of the court, does not constitute involuntary manslaughter a misdemeanor instead of a felony, the effect of the proviso being to mitigate punishment in cases of involuntary manslaughter, and not to set up involuntary manslaughter as a separate offense. *State v. Dunn*, 208 N. C. 333, 180 S. E. 708 (1935). See also, *Orinoco Supply Co. v. Masonry, etc., Home*, 163 N. C.

513, 79 S. E. 964 (1913); *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863 (1942).

Thus the superior court has jurisdiction of a prosecution under the statute although the fatal accident occurred within the territorial jurisdiction of a city court having exclusive original jurisdiction of misdemeanors. *State v. Leonard*, 208 N. C. 346, 180 S. E. 710 (1935).

The proviso prescribes a "specific punishment," and a sentence of imprisonment in the State prison for a term of seven years upon defendant's plea of guilty of involuntary manslaughter will be upheld, the punishment being in the sound discretion of the trial court, limited only by the prohibition against cruel and unusual punishment. *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863 (1942).

§ 14-19. Punishment for second offense of manslaughter.—If any person, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, he shall be imprisoned in the State prison not less than five nor more than sixty years; and in every such case of conviction for such second offense, the prior conviction of the same person and sentence thereon may be shown to the court. (R. C., c. 34, s. 25; Code, s. 1056; Rev., s. 3633; C. S., s. 4202.)

§ 14-20. Killing adversary in duel; aiders and abettors declared accessories.—If any persons fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact. (1802, c. 608, s. 2, P. R.; R. C., c. 34, s. 3; Code, s. 1013; Rev., s. 3629; C. S., s. 4203.)

Cross References.—As to sending, accepting or bearing a challenge to fight a duel, or aiding and abetting a duel, see § 14-270. As to penalty for fighting a duel, see Art. XIV, § 2 of the N. C. Constitution.

Definition. — Webster's International Dictionary defines "duel" to be a combat between two persons, fought with deadly weapons by agreement. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (1903).

Offense at Common Law.—Duelling was an offence at common law, 4 Bl. Com., 145; *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (1903).

Deadly Weapons. — In 2 Bishop New Criminal Law, § 313(2), it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (1903).

When Offense Complete.—Both at common law and under our statute the offense is complete, although no casualty results.

State v. Fritz, 133 N. C. 725, 45 S. E. 957 (1903).

Challenge to Fight with Fists and Hands.—Challenge to fight a fair fight with fists and hands, without the use of any deadly weapons, is not dueling within the statute. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (1903).

Challenge to Fight Out of State.—Challenge to fight duel out of State is indictable under this section. *State v. Farrier*, 8 N. C. 487 (1821).

Indictments.—An indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. *State v. Farrier*, 8 N. C. 487 (1821).

Punishment.—Where a person is tried in the Superior Court for violation of the provisions of this section, but is convicted of a lesser offense, of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (1903).

ARTICLE 7.

Rape and Kindred Offenses.

§ 14-21. **Punishment for rape.**—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. (18 Eliz., c. 7; R. C., c. 34, s. 5; 1868-9, c. 167, s. 2; Code, s. 1101; Rev., s. 3637; 1917, c. 29; C. S., s. 4204; 1949, c. 299, s. 4.)

Cross References.—As to conviction for assault when defendant not guilty of rape, see § 15-169. As to exclusion of bystanders during trial for rape, see § 15-166.

Editor's Note. — At common law rape was a felony, but the offense was afterwards changed to a misdemeanor before the statute of Westminster 1. By that statute the punishment, which then was castration and loss of eyes, was mitigated. *State v. Dick*, 6 N. C. 388 (1818). But by the statute of Westminster 2, the offense was again changed to a felony, and hence its present existence as a felony is in virtue of that statute. *State v. Dick*, 6 N. C. 388 (1818); *State v. Jesse*, 20 N. C. 95 (1838).

Rape, under these and later statutes, was the "carnal knowledge of a female forcibly and against her will." This definition left out the elements of age altogether. But as the instances of children below the age of discretion being enticed to yield without knowledge of the act and its consequences multiplied, it became necessary to fix an age under which it should be presumed, not that the act could not be consummated, but that consent could not be given. And so it came to be provided that the consummation of the act upon a female under ten years of age, with or without her consent, should be the same as if consummated upon a female over ten years of age without her consent or against her will. And the object of 18 Eliz., conclusively presuming lack of consent of a female under ten years of age, was not to create a new offense distinct from rape, but it was to make such carnal knowledge and abuse rape. The reason why the act does not call it rape in so many words is because of the seeming incongruity of calling an act rape when it is by consent, whereas the established meaning of rape is "against her will." So that now the definition of rape of a female over ten years of age is as it always has been, "carnal knowledge against her will." But since 18 Eliz. and under our statute rape of a female under ten years of

age is simply carnal knowledge; or in other words, carnal knowledge of a female under ten years of age is rape. *State v. Johnston*, 76 N. C. 209 (1877).

By the 1917 amendment the age of consent, below which it is conclusively presumed that a female child could not consent to sexual intercourse, was raised from ten to twelve years.

The 1949 amendment added the proviso to this section. Prior to the amendment a verdict of guilty of rape made punishment by death imperative. But now the jury may render a verdict of guilty of rape with a recommendation of life imprisonment. The clause "and the court shall so instruct the jury," merely directs the court to instruct the jury that such verdict may be returned. *State v. Shackelford*, 232 N. C. 299, 59 S. E. (2d) 825 (1950). For brief comment on amendment, see 27 N. C. Law Rev. 449. For propriety of arguing parole law in urging jury to withhold recommendation, see 28 N. C. Law Rev. 342.

The 1949 amendment makes no change in the elements of the crime or in the rules of evidence applicable in the trial on a charge of rape. *State v. Shackelford*, 232 N. C. 299, 59 S. E. (2d) 825 (1950).

"The 'abusing' construed with the 'carnally knowing' means the imposing upon, deflowering, degrading, ill-treating, debauching and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist. If the act be committed forcibly and against her will, it would be rape without reference to the statute." *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

"'Injury' of her genital organs might have occurred from the effort to penetrate, or in some other way; but the statute does not declare it to be an element of the crime to injure or abuse the organs." *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

Same—Not Endeavoring to Penetrate.—

"To have injured the organs in some way other than by endeavoring to penetrate with his person, if done with her consent, though it would be abusing her, would not be a crime, because there was no act of carnal knowledge." *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

Same—Against Her Will.—"But if the injury occurred against her will and intentionally, then it, the injury, would be embraced in the assault charged, for which he could be convicted." *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

Presumption of Force.—Under this section, force is conclusively presumed in the case of carnal knowledge of a female under the age of ten (now twelve). *State v. Dancy*, 83 N. C. 608 (1880).

Age of Consent.—It is a settled construction of the latter clause of this section that to carnally know and abuse any child under ten (now twelve) years of age, whether she consents to such carnal knowledge or not, is rape. *State v. Storkey*, 63 N. C. 7 (1868); *State v. Goldston*, 103 N. C. 323, 9 S. E. 580 (1889).

But it in no way affects the guilt of one who carnally knows a female above that age against her will. *State v. Storkey*, 63 N. C. 7 (1868).

Carnally knowing any female of the age of twelve years or more by force and against her will is rape; and carnally knowing and abusing any female child under the age of twelve years is also rape. *State v. Johnson*, 226 N. C. 671, 40 S. E. (2d) 113 (1946).

Under the second clause of this section relating to unlawfully and carnally knowing and abusing any female child under the age of twelve years, neither force nor lack of consent need be alleged or proven, and such child is by virtue of this section presumed incapable of consenting. *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678 (1946).

Penetration without Emission of Seed Sufficient.—In rape the least penetration of the person is sufficient, and the emission of seed is unnecessary. *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

Before the passage of the Act of 1860-'61, ch. 30 (now § 14-23), it was decided in *State v. Gray*, 53 N. C. 170 (1860), that in an indictment under this section, for carnally knowing and abusing an infant female under the age of ten (now twelve) years, there must be proof of the emission of seed, as well as of penetration, in order to convict the offender. Immediately after that decision, and probably in consequence of it, the act of 1860-'61, ch. 30 was

passed, providing that it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon the proof of penetration only. *State v. Hodges*, 61 N. C. 231 (1867).

Offense Complete on Proof of Penetration.—"It shall not be necessary upon the trial of any indictment for the offense of rape, carnally knowing and abusing any female child under 10 (now 12) years of age, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only." *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

Upon Whom Rape May Be Committed.

—For a conviction of rape under this section it is not always essential that this offense be committed upon a virtuous woman or actual physical force be used. The circumstances of this case may do away with the necessity of all the elements of the crime and yet constitute rape, as in the following cases.—Ed. Note.

Same—Common Strumpet. — One may be guilty of rape on a common strumpet or a woman shown to have been his mistress previously. *State v. Long*, 93 N. C. 542 (1885).

Capacity of Infant to Commit Rape.—An infant under the age of 14 can not commit the crime of rape or assault with intent to commit rape. *State v. Pugh*, 52 N. C. 61 (1859); *State v. Gray*, 53 N. C. 170 (1860); *State v. Sam*, 60 N. C. 293 (1864).

Who May Be Guilty of Rape.—The word "person", in this section, includes slaves, free negroes and free persons of color, as well as white men. *State v. Peter*, 53 N. C. 19 (1860).

Same—Two or More Persons.—Two or more persons may be guilty of the single crime of rape by being present, aiding and abetting in its commission. *State v. Jordan*, 110 N. C. 491, 14 S. E. 752 (1892).

Same—Aiding and Abetting.—One holding the husband of prosecutrix while another is perpetrating the crime of rape is guilty as principal in the offense. *State v. Jordan*, 110 N. C. 491, 14 S. E. 752 (1892).

Same—Female Aiding Man to Commit Crime.—A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. *State v. Hairston*, 121 N. C. 579, 28 S. E. 492 (1897).

Necessary Allegations—Intent.—By this section, rape is the ravishing and carnally knowing any female of the age of twelve

or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indictment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not. *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923).

Intent is not an element of the offense of carnally knowing or abusing a female child under the age of twelve years, and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied. *State v. Gibson*, 221 N. C. 252, 20 S. E. (2d) 51 (1942).

Same—"By Force and against Her Will."—An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. *State v. Benton*, 226 N. C. 745, 40 S. E. (2d) 617 (1946).

An indictment for rape of a female twelve years of age or more which charged that defendants did violently and feloniously ravish and carnally know but failed to charge that offense was committed forcibly and against her will is fatally defective, it being necessary in order to support the death penalty that both elements be alleged and proven. *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678 (1946).

When indictment charging rape is insufficient for failure to allege that offense was committed "forcibly" and "against her will," the allowance of motion in arrest of judgment does not preclude subsequent trial of defendants upon proper bills. *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678 (1946).

"Forcibly" Can Be Supplied by Any Equivalent Word.—The absence of both "forcibly" and "against her will" in the indictment is fatal, but "forcibly" can be supplied by any equivalent word. It is not supplied by the use of the word "ravish," but is sufficiently charged by the words "feloniously and against her will." *State v. Johnson*, 226 N. C. 266, 37 S. E. (2d) 678 (1946).

§ 14-22. Punishment for assault with intent to commit rape.—Every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the State's prison not less than one nor more than fifteen years. (1823, c. 1229, P. R.; R. C., c. 107, s. 44; 1868-9, c. 167, s. 3; Code, s. 1102; Rev., s. 3638; 1917, c. 162, s. 1; C. S., s. 4205.)

Editor's Note.—The offense of "assault with intent to commit rape" is a separate and distinct crime in and by itself and is not an "attempt to commit rape," as it is,

Instructions.—An instruction which fails to charge that the carnal knowledge of the prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held for reversible error. *State v. Simmons*, 228 N. C. 258, 45 S. E. (2d) 121 (1947).

In a prosecution against two defendants for rape of prosecutrix, at different times on the same night, where the State's evidence tended to show that the assaults were made separately, without evidence that either defendant aided and abetted the other, there was reversible error in a charge that, if the intent to ravish and carnally know prosecutrix existed in the mind of one of defendants, or both of them, at any time during the assault, they would be guilty of an assault with intent to commit rape. *State v. Walsh*, 224 N. C. 218, 29 S. E. (2d) 743 (1944).

Where the indictment charges that defendant did ravish and carnally know prosecutrix by force and against her will, she being a child under twelve years of age, it is not error for the court to present to the jury, as applicable to the evidence in the case, both the question of carnal knowledge of prosecutrix when she was under twelve years of age, and carnal knowledge of prosecutrix when she was over twelve years of age by force and against her will. *State v. Johnson*, 213 N. C. 389, 196 S. E. 327 (1938).

Sufficiency of Evidence. — In *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560 (1944), it was held that all the evidence showed carnal knowledge and abuse of a female child under the age of twelve years.

In *State v. Brown*, 227 N. C. 383, 42 S. E. (2d) 402 (1947), the court held that there was sufficient evidence to sustain the verdict of guilty of rape.

Applied in *State v. Jackson*, 211 N. C. 202, 189 S. E. 510 (1937); *State v. Wagstaff*, 219 N. C. 15, 12 S. E. (2d) 657 (1941); *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948).

Quoted in *State v. Speller*, 231 N. C. 549, 57 S. E. (2d) 759 (1950).

Cited in *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812 (1942); *State v. Swink*, 229 N. C. 123, 47 S. E. (2d) 852 (1948).

sometimes, falsely designated. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent

to commit rape." See *State v. Hewett*, 158 N. C. 627, 74 S. E. 356 (1912).

In General.—This section should be construed as if it read as follows: If any person shall attempt to commit rape specified in the preceding section, that is to say, to carnally know a female over ten (now twelve) years of age against her will, or to carnally know and abuse a female under ten (now twelve) years of age, with or against her will, he shall be punished, etc. *State v. Johnston*, 76 N. C. 209 (1877).

The offense defined by this section is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it. *State v. Adams*, 214 N. C. 501, 199 S. E. 716 (1938).

"In order to convict a defendant on the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part." *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812 (1942), quoting *State v. Massey*, 86 N. C. 658, 41 Am. Rep. 478 (1882); *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458 (1944); *State v. Overcash*, 226 N. C. 632, 39 S. E. (2d) 810 (1946); *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84 (1947).

Assault with intent to commit rape is not the same as an attempt to commit rape, but is an assault with the requisite felonious attempt. *State v. Randolph*, 232 N. C. 382, 61 S. E. (2d) 87 (1950).

A jury may not convict an accused of assault with intent to commit rape without evidence and findings, upon proper instructions, that defendant committed an assault upon the person of prosecutrix with intent at the time to ravish and carnally know her, by force and against her will, notwithstanding any resistance she might make. *State v. Walsh*, 224 N. C. 218, 29 S. E. (2d) 743 (1944).

Age of Female.—This section in the act of 1868 followed immediately after the second section (14-21) of that act, and had direct reference to it, and was intended to include assaults upon females, whether of the age of ten years (now twelve) or more. It uses the words "any female," which embrace females of all ages. *State v. Dancy*, 83 N. C. 608 (1880).

Who May Be Guilty of Offense.—At common law, rape was a felony, and all persons who were present, aiding and abetting a man to commit the offense, whether men or

women, were principal offenders and might be indicted as such. In this regard the law is not different today, so that a woman as well as a man can be found guilty as a principal in the offense. See *State v. Jones*, 83 N. C. 605 (1880).

Same—Husband upon Wife.—A husband who, by threats to kill in event of refusal, compels his wife to submit to, and a man to attempt, sexual connection, is guilty of an assault with intent to commit a rape upon his wife. *State v. Dowell*, 106 N. C. 722, 11 S. E. 525 (1890).

Same—Females.—A female who aids and abets a male assailant in an attempt to commit a rape becomes thereby a principal in the offense. *State v. Jones*, 83 N. C. 605 (1880).

Same—Infant under 14.—An infant under the age of 14 years cannot be guilty of an assault with intent to commit rape. *State v. Sam*, 60 N. C. 293 (1864).

Withdrawal of Consent before Perpetration of Offense.—If the prosecutrix consented to have connection with the prisoner upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of rape if he succeeds, and of an assault with intent to commit rape, if he does not succeed. *State v. Long*, 93 N. C. 542 (1885).

Effect of Subsequent Consent.—It seems that this offense is complete, if the defendant attempts to force the prosecutrix against her will, although she afterwards consents. *State v. Long*, 93 N. C. 542 (1885).

Instruction that the mere touching of prosecutrix, without regard to her consent, would be an assault with intent to commit rape if the defendant at the time intended to ravish in the event it became necessary to do so to accomplish his purpose, was erroneous for disregarding the essential element of unlawfulness, rudeness or violence which makes the taking hold of a female an assault. *State v. Overcash*, 226 N. C. 632, 39 S. E. (2d) 810 (1946).

Instruction Held Reversible Error.—In a prosecution for an assault with intent to commit rape, a repeated instruction defining the offense as an assault with an intent to have sexual intercourse with prosecutrix "without her conscious express permission" must be held for reversible error notwithstanding that in other portions of the charge the jury was instructed that the intent must be to accomplish the act "forcibly and against her will," and notwithstanding that the question of consent or

permission was not mooted. *State v. Randolph*, 232 N. C. 382, 61 S. E. (2d) 87 (1950).

Evidence Held Insufficient. — In *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84 (1947), the court held that the evidence was insufficient to sustain a verdict of assault with intent to commit rape.

Punishment. — Unlawfully to carnally

know and abuse a female under the age of ten years (now twelve) constitutes a crime of rape; therefore, one convicted of an assault with intent to commit such offense is liable to the punishment prescribed in this section. *State v. Dancy*, 83 N. C. 608 (1880).

Applied in *State v. Johnson*, 227 N. C. 587, 42 S. E. (2d) 685 (1947).

§ 14-23. Emission not necessary to constitute rape and buggery. — It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. (1860-1, c. 30; Code, s. 1105; Rev., s. 3639; 1917, c. 29; C. S., s. 4206.)

Cross Reference. — For a treatment of the origin and effect of this section, see note to § 14-21.

Cited in *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107 (1950).

§ 14-24. Obtaining carnal knowledge of married woman by personating husband. — If any person shall have carnal knowledge of any married woman by fraud in personating her husband, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison at hard labor for not less than ten nor more than twenty years. (1881, c. 89, s. 1; Code, s. 1103; Rev., s. 3624; C. S., s. 4207.)

Misrepresentation by Words or Conduct Sufficient. — A person who, either by his acts or by his conduct, induces a woman to believe he is her husband and has intercourse with her, is guilty of a felony under this section. *State v. Williams*, 128 N. C. 573, 37 S. E. 952 (1901).

Offense Does Not Constitute Rape. — An intercourse, obtained with such fraud, is not rape, for lack of force, except in those cases where the prisoner has been instrumental in disabling the prosecutrix to make resistance. *State v. Brooks*, 76 N. C. 1 (1877).

§ 14-25. Attempted carnal knowledge of married woman by personating husband. — Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the State's prison at hard labor for not less than five nor more than fifteen years. (1881, c. 89, s. 2; Code, s. 1104; Rev., s. 3625; C. S., s. 4208.)

Violation of this section is not tantamount to assault with intent to commit rape. *State v. Brooks*, 76 N. C. 1 (1877).

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old. — If any male person shall carnally know or abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court; and any female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: Provided, that if the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution. (1895, c. 295; Rev., s. 3348; 1917, c. 29; C. S., s. 4209; 1923, c. 140, s. 1.)

Editor's Note. — Prior to 1917 the protection of this section extended only to a female child over ten and under fourteen years of age. The same act (1917) that raised the age of consent for the criminal offense of rape to twelve, limited this sec-

tion by making it applicable to females over twelve and under fourteen years of age only. The radical change in the provisions of the section as it now stands was, however, effected by the acts of 1923, ch. 140. As a result of this plausible amend-

ment, the crime under this section is committed if the female child is over twelve and under sixteen, thus raising the age of consent for this particular offense to sixteen years.

The section was further amended by making it a misdemeanor for any female to carnally know any male child under the age of sixteen, a new criminal offense, hitherto unguarded against, and one that seems only fair and reasonable in an age that recognizes the equal rights of men and women.

Lastly the new section makes the marriage of the offenders a bar to further prosecution. See 1 N. C. Law Rev. 286.

Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in no wise affect this section.

This section is designed to protect chaste girls between the specified ages from predatory males who would rob them of their virtue. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107 (1950).

Essentials of Crime.—The essentials of the crime in this case are (1) carnally know or abuse a female child; (2) over twelve and under sixteen years of age; (3) the female child never before having had sexual intercourse with any person. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417 (1925); *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107 (1950).

"Carnal knowledge" and "sexual intercourse" are synonymous, and exist in a legal sense when there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107 (1950).

The State need not charge or prove that accused knew female child was under age of consent. One having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial. *State v. Wade*, 224 N. C. 760, 32 S. E. (2d) 314 (1944).

Injuring Genital Organs Not Sufficient.—In an indictment under this section, for carnally knowing a girl between the ages of 10 and 14 (now 12 and 16), it is error to charge that the crime would be complete "if the jury should find that the defendant injured and abused her genital organs." *State v. Monds*, 130 N. C. 697, 41 S. E. 789 (1902).

Aiding and Abetting.—One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under sixteen years of age, in viola-

tion of this section, and with knowledge of this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abetter in the commission of the offense, and punishable as a principal therein. *State v. Hart*, 186 N. C. 582, 120 S. E. 345 (1923).

Joinder of Offenses.—A charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under this section, can be properly joined in separate counts in one indictment, under § 15-152, since they are related in character and grow out of the same transaction, and are properly left to the jury under the general plea of not guilty, without any requirement on the part of the State to make an election. *State v. Hall*, 214 N. C. 639, 200 S. E. 375 (1939).

Responsiveness of Verdict.—Defendant was charged in the first count with rape and in the second count with having carnal knowledge of a female child over twelve and under sixteen years of age. The solicitor announced he would not ask for a conviction of the capital offense of rape and the court correctly charged the jury as to the verdicts permissible upon the first count, and charged that upon the second count they might find defendant guilty or not guilty. The jury returned the verdict of not guilty upon the first count and guilty of assault upon a female upon the second count. The court thereupon instructed the jury again as to the verdicts it might render upon the respective counts, and upon the coming in of the jury the second time, it returned a verdict of guilty of assault upon a female upon the first count and guilty upon the second count. Held: Even conceding that the first verdict of not guilty upon the first count precluded the jury from again considering that charge and rendered ineffective the second verdict of guilty of an assault upon a female, its first verdict upon the second count was not responsive to the indictment and was not a verdict permitted by law, and therefore the court properly instructed it to reconsider its verdict upon the second count, and the verdict finally rendered thereon is consistent with law and was properly accepted by the court. *State v. Wilson*, 218 N. C. 556, 11 S. E. (2d) 567 (1940).

Evidence of Conversation.—Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen (now sixteen) years of age, her testimony in answer to the questions

of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. *State v. Winder*, 183 N. C. 776, 111 S. E. 530 (1922).

Evidence of Age. — Prosecuting witness may give competent testimony as to her age. *State v. Trippe*, 222 N. C. 600, 24 S. E. (2d) 340 (1943).

Family Bible Entries Evidence of Child's Age. — Authenticated entries in family Bible constitute competent evidence to prove age of child. *State v. Hairston*, 121 N. C. 579, 28 S. E. 492 (1897).

Expression of Opinion by Court. — In prosecution under this section, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age." Held: The instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by § 1-180, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age if they believed the uncontradicted testimony. *State v. Wyont*, 218 N. C. 505, 11 S. E. (2d) 473 (1940).

Use of term "statutory rape" in the charge was not prejudicial error where charge contained correct definition, and properly placed burden of proof on the State, as to each essential element of the offense. *State v. Bullins*, 226 N. C. 142, 36 S. E. (2d) 915 (1946).

Failure to give a correct charge on the element of age is error in a prosecution under this section. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949).

Or Chastity. — Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of § 1-180, and an exception thereto will be sustained. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949).

Instruction Held Prejudicial. — In a prosecution under this section, where defendant

offered evidence of the immoral character of the prosecutrix and her sister and aunt, a charge that such testimony was not competent upon the question of guilt or innocence, but that it was material as bearing upon the likelihood of defendant indulging in such conduct, was prejudicial error. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949).

Evidence of Relations with Other Men. — In a prosecution under this section, it is not error to exclude evidence of improper relations between the prosecuting witness and another several months after the alleged crime of the defendant. *State v. Houpe*, 207 N. C. 377, 177 S. E. 20 (1934).

Evidence of Improper Advances of Similar Nature. — In a prosecution under this section allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. *State v. Edwards*, 224 N. C. 527, 31 S. E. (2d) 516 (1944).

Evidence Sufficient for Jury. — Evidence that prosecutrix at the time alleged was an innocent, virtuous woman, under sixteen years of age, and that defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of sixteen, is sufficient to be submitted to the jury in a prosecution under this section. *State v. Wyont*, 218 N. C. 505, 11 S. E. (2d) 473 (1940).

Testimony by prosecutrix that defendant had "intercourse" with her and "raped" her is sufficient evidence of carnal knowledge to be submitted to the jury in a prosecution under this section. *State v. Bowman*, 232 N. C. 374, 61 S. E. (2d) 107 (1950).

Evidence held sufficient to support conviction in a prosecution under this section. *State v. Bryant*, 228 N. C. 641, 46 S. E. (2d) 847 (1948).

Plea of Guilty May Not Be Withdrawn. — Upon the trial under this section of carnally knowing a female child over twelve and under sixteen years of age, the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion. *State v. Porter*, 188 N. C. 804, 125 S. E. 615 (1924).

Variance as to Time. — It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and

proof as to time is not material. *State v. Trippe*, 222 N. C. 600, 24 S. E. (2d) 340 (1943).

Time is not of the essence of the offense denounced by this section, and on trial of an indictment for carnal knowledge of a female under 16 years of age a variance between allegation and proof as to the date is not material, the statute of limitations not being involved. *State v. Baxley*, 223 N. C. 210, 25 S. E. (2d) 621 (1943).

Punishment.—The felony defined in this

section is not one “for which no specific punishment is prescribed” within § 14-2, and the discretion of the court in fixing the punishment is limited only by Const., Art. I, § 14. A sentence of 30 years and hard labor is not a “cruel and unusual punishment” for an offense under this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417 (1925).

Cited in *State v. Cain*, 209 N. C. 275, 183 S. E. 300 (1936).

§ 14-27. Jurisdiction of court; offenders classed as delinquents.—

All persons charged with a violation of § 14-26 under the age of sixteen years shall be subject to the jurisdiction of the juvenile court and such other courts as may hereafter exercise such jurisdiction, and shall be classed as delinquents and not as felons: Provided, that where the offenders agree to marry, the consent of the parent shall not be necessary: Provided further, that any male person convicted of the violation of § 14-26 who is under eighteen (18) years of age, shall be guilty of a misdemeanor only. (1923, c. 140, s. 2; C. S., s. 4209(a).)

Editor's Note.—This section is summarized and a brief history of the law given in 1 N. C. Law Rev. 286.

Session Laws 1947, c. 383, amending §§ 14-319, 51-2 and 51-3 provides that its provisions shall in no wise affect this section.

ARTICLE 8.

Assaults.

§ 14-28. **Malicious castration.**—If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the State's prison for not less than five nor more than sixty years. (1831, c. 40, s. 1; R. C., c. 34, s. 4; 1868-9, c. 167, s. 6; Code, s. 999; Rev., s. 3627; C. S., s. 4210.)

Cross Reference.—See annotations under §§ 14-29 and 14-30.

Appeal from Sentence for Punishment.—Upon conviction of the criminal offense inhibited by this section, sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of our Constitution, Art. I, § 14,

or discriminatory against the principal actor in committing the crime, when the others participating therein to a less extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. *State v. Griffin*, 190 N. C. 133, 129 S. E. 410 (1925).

§ 14-29. Castration or other maiming without malice aforethought.

—If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned in the county jail or State's prison not less than six months nor more than ten years, and fined, in the discretion of the court. (1754, c. 56, P. R.; 1791, c. 339, ss. 2, 3, P. R.; 1831, c. 40, s. 2; R. C., c. 34, s. 47; Code, s. 1000; Rev., s. 3626; C. S., s. 4211.)

Cross Reference.—See annotations under § 14-30.

Proof of Malice Aforethought Not Necessary.—Proof of malice aforethought, or

of a preconceived intention to commit the maiming, is not necessary. *State v. Girkin*, 23 N. C. 121 (1840).

§ 14-30. Malicious maiming.—If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall, for the first offense, be punished by imprisonment in the State's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offense shall be imprisoned in the State's prison not less than five nor more than sixty years. (22 and 23 Car. II, c. 1 (Coventry Act); 1754, c. 56, P. R.; 1791, c. 339, s. 1, P. R.; 1831, c. 12; R. C., c. 34, s. 14; Code, s. 1080; Rev., s. 3636; C. S., s. 4212.)

When Corpus Delicti Complete.—Under this section the corpus delicti is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense. *State v. Crawford*, 13 N. C. 425 (1830).

"Malice Aforethought" Construed.—For the words "malice aforethought" do not mean an actual, express or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids. *State v. Crawford*, 13 N. C. 425 (1830).

Malicious Intent Express or Implied. — The malicious intent to maim or disfigure may either be expressed or implied from circumstances. *State v. Irwin*, 2 N. C. 112 (1794).

Proof of Grudges or Threatenings Not Necessary. — And proof of antecedent grudges, threatenings or an express design is not necessary. *State v. Irwin*, 2 N. C. 112 (1794).

Presumptions.—An intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. *State v. Girkin*, 23 N. C. 121 (1840).

What Constitutes Maiming.—To constitute maiming under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off—it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. *State v. Girkin*, 23 N. C. 121 (1840).

"To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. *State v. Malpass*, 226 N. C. 403,

38 S. E. (2d) 156 (1946).

Where there was no evidence of permanent injury to the privy parts of the prosecuting witness, it was error for the court to submit to jury the question of the guilt of defendant under this section. *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156 (1946).

Conviction for Loss of Eye.—Construing this section in connection with the history of legislation on the subject, it is held that thereunder the loss of an eye is not included in the offense of mayhem, and though the infliction thereof without malice may neither be sustained as provided by § 14-29, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the provisions of § 14-29. *State v. Wilson*, 188 N. C. 781, 125 S. E. 612 (1924).

First Blow or Sudden Affray. — The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. *State v. Crawford*, 13 N. C. 425 (1830).

Same—Accident or Self-Defense.—When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. *State v. Evans*, 2 N. C. 281 (1796); *State v. Skidmore*, 87 N. C. 509 (1882).

Indictment — Necessary Allegations.—An indictment, for biting off ear, must state the offense to be done on purpose, as well as unlawfully. *State v. Ormond*, 18 N. C. 119 (1834).

Same—Unnecessary Allegations. — But it need not be alleged whether it was the right or left ear. *State v. Green*, 29 N. C. 39 (1846).

§ 14-31. Maliciously assaulting in a secret manner.—If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other

person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony and shall be punished by imprisonment in jail or in the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court. (1887, c. 32; Rev., s. 3621; 1919, c. 25; C. S., s. 4213.)

Cross Reference. — As to an assault in this State injuring person in another state, see § 15-132.

Editor's Note. — The 1919 amendment added the clause relative to consciousness of the presence of the assailant.

Effect of Words "or Otherwise." — The legislature, after denouncing as criminal secret assaults with intent to kill, and after giving one explicit illustration, added the words "or otherwise," in order to prevent the application of the maxim *expressio unius exclusio alterius*, thus including every other manner of making secret attempts, regardless of the attendant circumstances. *State v. Shade*, 115 N. C. 757, 20 S. E. 537 (1894).

Assault with Intent to Commit Murder. — "Attempts to commit any of the four capital offenses were formerly felonies, but during the prosecution for 'Ku Klux' troubles the offense of assault with intent to commit murder was reduced to a simple misdemeanor. The act of 1887, ch. 32, restored the grade of the offense to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. *State v. Telfair*, 109 N. C. 878, 13 S. E. 726 (1891)." *State v. Harris*, 120 N. C. 577, 26 S. E. 774 (1897).

What Constitutes Secret Assault. — While it is not required for the conviction of a secret assault, under the provisions of this section, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error. *State v. Oxendine*, 187 N. C. 658, 122 S. E. 568 (1924).

Same—Assault from Behind. — An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault. *State v. Harris*, 120 N. C. 577, 26 S. E. 774 (1897).

Same—Assault by Means of Poison. — An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with

intent to kill punishable as a felony. *State v. Alderman*, 182 N. C. 917, 110 S. E. 59 (1921).

Same—Assault Facing Victim. — Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of this section. *State v. Patton*, 115 N. C. 753, 20 S. E. 538 (1894).

Same—Sufficiency. — For sufficiency of evidence to prove a secret assault, see *State v. Bridges*, 178 N. C. 733, 101 S. E. 29 (1919).

Indictment — Necessary Allegations. — Indictment omitting the words "by waylaying or otherwise," is sufficient. *State v. Shade*, 115 N. C. 757, 20 S. E. 537 (1894).

Elements of Offense, Burden of Proof. — On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by this section, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence is conflicting, it is an expression of opinion inhibited by § 1-180, for the judge to charge the jury that if they believe the evidence, a cold-blooded and cruel assault had been committed. *State v. Kline*, 190 N. C. 177, 129 S. E. 417 (1925).

Evidence Permissible to Show Malice, etc. — As bearing on the question of malice and felonious intent, the State was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. *State v. Miller*, 189 N. C. 695, 128 S. E. 1 (1925).

Instruction. — For charge not sufficiently explaining the offense, see *State v. Vanderburg*, 200 N. C. 713, 158 S. E. 248 (1931).

Verdict for Simple Assault. — Upon the trial of an indictment charging a secret felonious assault, verdict may be rendered for simple assault. *State v. Jennings*, 104 N. C. 774, 10 S. E. 249 (1889).

An indictment charging a felonious assault with intent to kill as defined in this section, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser of-

fense. *State v. High*, 215 N. C. 244, 1 S. E. (2d) 563 (1939).

Cited in *State v. Strickland*, 192 N. C. 253, 134 S. E. 850 (1926); *State v. Potter*, 221 N. C. 153, 19 S. E. (2d) 257 (1942); *State v. Perry*, 225 N. C. 174, 33 S. E. (2d) 869 (1945); *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617 (1948).

§ 14-32. Assault with deadly weapon with intent to kill resulting in injury.—Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the State prison or be worked under the supervision of the State Highway and Public Works Commission for a period not less than four months nor more than ten years. (1919, c. 101; C. S., s. 4214; 1931, c. 145, s. 30.)

Cross Reference.—As to assault in this State resulting in injury in another state, see § 15-132.

Elements of Offense.—In order for a conviction of crime under the provisions of this section there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. *State v. Hefner*, 199 N. C. 778, 155 S. E. 879 (1930).

Law of Self-Defense Applicable.—The law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. *State v. Anderson*, 230 N. C. 54, 51 S. E. (2d) 895 (1949).

Indictment Necessary.—A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, under this section, and defendant may not be put to answer thereon but by indictment. *State v. Clegg*, 214 N. C. 675, 200 S. E. 371 (1939).

An indictment which follows substantially the language of this section as to its essential elements meets the requirements of law. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132 (1947).

In an indictment charging an assault with intent to kill "and murder" the words "and murder" are surplusage and place no additional burden on the State. *State v. Plemmons*, 230 N. C. 56, 52 S. E. (2d) 10

(1949).

"A certain knife" is a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132 (1947).

Injury Need Not Be Described in Indictment.—In an indictment, under this section, it is not necessary to describe the injury further than in the words of the statute. *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943).

Evidence of Infliction of Serious Injury.—Evidence that several defendants indicted under the provisions of this section were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, is sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of the statute. *State v. Hefner*, 199 N. C. 778, 155 S. E. 879 (1930).

Evidence of Use of Deadly Weapon.—Where the evidence against the defendants, tried under an indictment for violating this section tends to show an assault with a blackjack and other like instruments whereby they beat the one assaulted into unconsciousness and carried him into a field where alone he eventually recovered consciousness, it is sufficient as to the use of a deadly weapon in making the assault. *State v. Hefner*, 199 N. C. 778, 155 S. E. 879 (1930).

Evidence of communicated threats was received with apparent approval in *State*

v. Scott, 26 N. C. 409 (1844), and with explicit approval in *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455 (1877). It was denied in *State v. Byrd*, 121 N. C. 684, 28 S. E. 353 (1897), in an obscure opinion and in *State v. Skidmore*, 87 N. C. 509 (1882), in an opinion which overlooked the two cases first cited. 11 N. C. Law Rev. 230.

Instruction as to Serious Injury.—Where the evidence is sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that “serious injury” included “anything that would cause a breach of the peace,” is held not to be reversible error to the defendant’s prejudice where all the evidence tends to show that serious injury was inflicted in violation of the statute. *State v. Hefner*, 199 N. C. 778, 155 S. E. 879 (1930).

Omission of “Assault with a Deadly Weapon” from Charge to Jury.—When accused is indicted, under this section, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of “assault with a deadly weapon” from the catalogue of permissible verdicts, does not deprive the jury of the statutory authority to consider it. *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943).

The term “intent to kill” is self-explanatory and the trial court is not required to define the term in its charge. *State v. Flemmons*, 230 N. C. 56, 52 S. E. (2d) 10 (1949).

Erroneous Instruction Not Cured by Verdict.—An instruction that defendant’s admission of assault with a deadly weapon, which resulted in serious injury, raised the presumption of defendant’s guilt of assault with a deadly weapon with intent to kill, resulting in serious injury, as charged, and placed the burden on defendant to satisfy the jury of matters in mitigation or excuse, is not cured by a verdict of guilty of the misdemeanor of an assault with a deadly weapon, since the instruction required defendant to show to the satisfaction of the jury matters in mitigation or excuse before he could successfully ask for a verdict of not guilty. *State v. Carver*, 213 N. C. 150, 195 S. E. 349 (1938).

Burden of Proof.—This section under which the appealing defendant was indicted and convicted provides that any person who assaults another (1) with a deadly weapon, (2) with intent to kill, and (3) inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punishable by imprisonment in the

State’s prison or be worked on the county roads for a period of not less than four months nor more than ten years. These three essential elements must be proved in order to warrant a conviction under the statute (*State v. Crisp*, 188 N. C. 799, 125 S. E. 543 (1924)); and the burden is on the State to establish them all beyond a reasonable doubt, where the defendant enters a plea of “not guilty” to the charge contained in the bill of indictment. *State v. Redditt*, 189 N. C. 176, 126 S. E. 506 (1925).

State Must Prove Murderous Intent.—Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raises a presumption of felonious intent is reversible error, the fact of murderous intent being for the State to prove. *State v. Gibson*, 196 N. C. 393, 145 S. E. 772 (1928).

The deadly character of a weapon may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, is sufficient for the jury to infer that the knife was a deadly weapon. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132 (1947).

Admissibility of Evidence.—See *State v. Oxendine*, 224 N. C. 825, 32 S. E. (2d) 648 (1945).

The introduction in evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use and the injuries inflicted in establishing the character of the weapon as deadly. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132 (1947).

Sufficiency of Evidence.—In a prosecution under this section it was held that the evidence was amply sufficient to sustain a verdict of “guilty of an assault with a deadly weapon.” *State v. Cody*, 225 N. C. 38, 33 S. E. (2d) 71 (1945).

Guilt of Lesser Degree of Offense.—Where the defendants are tried for violating this section in making an assault with a deadly weapon with intent to kill, etc., the action will not be dismissed when the undisputed evidence tends to show the assault was made with a deadly weapon. *State v. Hefner*, 199 N. C. 778, 155 S. E. 879 (1930).

Conviction of Simple Assault.—An instruction directing verdict of guilty of at least simple assault is not erroneous when the prosecuting witness had been injured by being struck by some hard metallic

substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries. *State v. Strickland*, 192 N. C. 253, 134 S. E. 850 (1926).

Applied in *State v. Jones*, 229 N. C. 276, 49 S. E. (2d) 463 (1948); *State v. Muse*, 229 N. C. 536, 50 S. E. (2d) 311 (1948); *State v. Way*, 231 N. C. 716, 58 S. E. (2d) 716 (1950).

Stated in *State v. Goff*, 205 N. C. 545,

172 S. E. 407 (1934).

Cited in *State v. Colson*, 194 N. C. 206, 139 S. E. 230 (1927); *State v. Potter*, 221 N. C. 153, 19 S. E. (2d) 257 (1942); *State v. Perry*, 225 N. C. 174, 33 S. E. (2d) 869 (1945); *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617 (1948); *State v. Werst*, 232 N. C. 330, 59 S. E. (2d) 835 (1950); *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

§ 14-33. **Punishment for assault.**—(a) In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court, subject to the provisions of subsection (b).

(b) Notwithstanding the provisions of subsection (a), the punishment in cases of assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars (\$50.00) or imprisonment for thirty days, when no deadly weapon has been used and no serious damage done except in cases of:

- (1) Assault with intent to kill, or
- (2) Assault with intent to commit rape, or
- (3) Assault or assault and battery by any man or boy over eighteen years old on any female person, or
- (4) The person committing the assault, (excluding and excepting parents, school teachers, guardians or persons in loco parentis), is eighteen years old or over, and the person on whom the assault is committed is under the age of twelve years.

(c) In all cases of assault, assault and battery, and affrays, wherein deadly weapons are used and serious injury is inflicted, and the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of death or serious bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620; 1911, c. 193; C. S., s. 4215; 1933, c. 189; 1949, c. 298.)

Cross Reference.—As to punishment for assault with intent to commit rape, see § 14-22.

Editor's Note. — The 1933 amendment added the provision relative to evidence of threats of assailant.

The 1949 amendment rewrote this section. See 27 N. C. Law Rev. 450.

As to excessive punishment, see *State v. Driver*, 78 N. C. 423 (1878); as to punishment under Acts of 1870-1, ch. 43, see *State v. McNeill*, 75 N. C. 15 (1876); *State v. Miller*, 75 N. C. 73 (1876).

Constitutionality.—This section is not unconstitutional on the grounds that severe sentences for criminal offenses can only be upheld under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intention to kill, the person convicted shall be punished by fine or imprisonment in

the discretion of the court, and not so limiting the court's discretion as to an assault upon a female, etc. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763 (1921).

The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse by the trial judge acting within a legislative discretion given him; and, in this case, a sentence of three months on the road, upon conviction for an assault upon a female, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763 (1921).

Same—Question of Discrimination. — This section is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitu-

tion. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763 (1921).

This section creates no new offense and relates only to punishment. Under its provisions all assaults and assaults and batteries not made felonious by other statutes are general misdemeanors punishable in the discretion of the court, except where no deadly weapon had been used and no serious damage done, the punishment may not exceed a fine of \$50 or imprisonment for 30 days, unless the assault comes within one of the exceptions appearing in this section. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the exceptions and they remain general misdemeanors. *State v. Jackson*, 226 N. C. 66, 36 S. E. (2d) 706 (1946).

Punishment—Extent.—While the language of this section authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of and imprisonment, or both, in the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. *State v. Smith*, 174 N. C. 804, 93 S. E. 910 (1917).

Where in a trial of an indictment, under the preceding section, defendant is convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's prison, there is error, as the offense described in the verdict is at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by this section. *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943).

When no time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual, and violative of Article I, § 14 of the Constitution. *State v. Crandall*, 225 N. C. 148, 33 S. E. (2d) 861 (1945).

Where the offense charged, an assault wherein serious damage was inflicted, was a misdemeanor, conviction thereof did not support judgment of imprisonment in the State's prison from two to five years. *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156 (1946).

Same—Limitation.—In conviction for simple assaults, where there is no intent to

commit rape, and no deadly weapon used, and no serious bodily harm done, the punishment is limited to a fine of \$50, or imprisonment for thirty days. *State v. Johnson*, 94 N. C. 863 (1886); *State v. Battle*, 130 N. C. 655, 41 S. E. 66 (1902), decided under former wording of section.

In prosecution for assault with a deadly weapon, appealing defendant relied upon and introduced evidence of self-defense and of matters in justification. The trial court instructed the jury that under the indictment and evidence the appealing defendant might be convicted of assault with a deadly weapon or of a simple assault. The jury convicted defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. It was held that the verdict of simple assault was permissible under the indictment and evidence, and the court was without power to sentence the appealing defendant to more than thirty days' imprisonment. *State v. Palmer*, 212 N. C. 10, 192 S. E. 896 (1937).

Effect of Acquittal on Part of Verdict.—The fact that the jury convicted defendant of assault with a deadly weapon, after it had acquitted him in a previous part of the verdict of assault with a deadly weapon doing serious injury, does not entitle him to his discharge on his motion in arrest of judgment. *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943).

Jurisdiction Where No Deadly Weapon Used and No Serious Injury Done.—Long prior to the enactment of the preceding section, the legislature had dealt with the general subject of assault—including assault as known at the common law—and had attempted to lay down a schedule of punishments according to the aggravation of the offense, and at the same time, by the provisions of this section, taken in connection with Art. IV, § 27, of the Constitution, carved out of the general jurisdiction of assaults given the courts an original and exclusive jurisdiction in the courts of the justice of the peace, where no deadly weapon had been used and no serious injury inflicted. *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943).

Presumption That Accused Is over Eighteen.—Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the

jury is not required to determine defendant's age. *State v. Lewis*, 224 N. C. 774, 32 S. E. (2d) 334 (1944), citing *State v. Jones*, 181 N. C. 546, 106 S. E. 817 (1921); *State v. Lefler*, 202 N. C. 700, 163 S. E. 873 (1932).

Jury to Determine Defendant's Age.—

In order to support the sentence as for a general misdemeanor it is required that the jury determine in its verdict specifically or by reference to the charge, that defendant is a male and was over eighteen years of age at the time of the assault. *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394 (1946).

Where there is no finding by jury that defendant was a man or boy over eighteen years of age at the time of the assault, judgment is not supported by the verdict, and a venire de novo will be ordered. *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394 (1946).

Evidence Sufficient under Section.—Evidence that the prisoner awakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though such evidence is insufficient for a conviction of the intent to ravish her. *State v. Hill*, 181 N. C. 558, 107 S. E. 140 (1921).

Evidence that a negro man twenty-three years of age several times accosted a white girl fifteen years of age, on the streets of a town, with improper solicitation, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, is held to be such evidence of violence, begun to be executed with ability to effectuate it, as will come within the intent and meaning of this section making it a crime for a man or boy over eighteen years of age to assault any female person. *State v. Williams*, 186 N. C. 627, 120 S. E. 224 (1923).

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the

said female, who thereupon ran a short distance to her home, the evidence is insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458 (1944).

In a criminal prosecution upon an indictment charging defendant with assault with intent to commit rape wherein defendant tendered to the court a plea of guilty of an assault upon a female, it was held that while the court found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous and that the plea tendered by defendant, and accepted by the court, did not constitute a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in this section. *State v. Tyson*, 223 N. C. 492, 27 S. E. (2d) 113 (1943).

In *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84 (1947), the court held the evidence sufficient to sustain a verdict of guilty of assault upon a female.

Evidence Insufficient.—In *State v. Silver*, 227 N. C. 352, 42 S. E. (2d) 208 (1947), the court held the evidence insufficient to sustain a verdict of guilty of an assault upon a female.

Burden to Prove Age below Eighteen.

— The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case, and it is not necessary to the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. *State v. Smith*, 157 N. C. 578, 72 S. E. 853 (1911).

Cited in *State v. Stansberry*, 197 N. C. 350, 148 S. E. 546 (1929); *State v. Griggs*, 197 N. C. 352, 148 S. E. 547 (1929); *State v. Perry*, 225 N. C. 174, 33 S. E. (2d) 869 (1945); *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

§ 14-34. Assaulting by pointing gun.—If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court. (1889, c. 527; Rev., s. 3622; C. S., s. 4216.)

Accidental Discharge of Gun — Manslaughter. — Where one points a loaded gun at another, though without intention

of discharging it, if the gun goes off accidentally and kills, it is manslaughter. *State v. Coble*, 177 N. C. 588, 99 S. E. 339

(1919); *State v. Boldin*, 227 N. C. 594, 42 S. E. (2d) 897 (1947).

When one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse its discharge, he is guilty at least of manslaughter. *State v. Stitt*, 146 N. C. 643, 61 S. E. 566 (1908).

Same — Question of Guilt for Jury. — Where one pointed a gun at another and death ensued by its discharge evidence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of manslaughter. *State v. Turnage*, 138 N. C. 566, 49 S. E. 913 (1905); *State v. Limerick*, 146 N. C. 649, 61 S. E. 568 (1908).

Gun Need Not Be Loaded. — In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the

defendant guilty, was correct under the provisions of this section. *State v. Atkinson*, 141 N. C. 734, 53 S. E. 228 (1906).

Pointing Pistol in Pocket. — An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error. *State v. Atkinson*, 141 N. C. 734, 53 S. E. 228 (1906).

Evidence of Guilt. — Defendant, pointing gun at the prosecutor, was, under the circumstances, guilty of an assault at common law, if not under this section. *State v. Scott*, 142 N. C. 582, 55 S. E. 69 (1906).

Applied in *State v. Head*, 214 N. C. 700, 200 S. E. 415 (1939).

Cited in *Whitlow v. Southern Ry. Co.*, 217 N. C. 558, 8 S. E. (2d) 809 (1940); *State v. Lambie*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

ARTICLE 9.

Hazing.

§ 14-35. **Hazing; definition and punishment.** — It shall be unlawful for any student in any college or school in this State to engage in what is known as hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass him, or to subject him to personal indignity." Any violation of this section shall constitute a misdemeanor. (1913, c. 169, ss. 1, 2, 3, 4; C. S., s. 4217.)

§ 14-36. **Expulsion from school; duty of faculty to expel.** — Upon conviction of any student of the offense of hazing, or of aiding or abetting in the commission of this offense, he shall, in addition to any punishment imposed by the court, be expelled from the college or school he is attending. The faculty or governing board of any college or school charged with the duty of expulsion of students for proper cause shall, upon such conviction at once expel the offender, and a failure to do so shall be a misdemeanor. (1913, c. 169, ss. 5, 6; C. S., s. 4218.)

§ 14-37. **Certain persons and schools excepted; copy of article to be posted.** — This article shall not apply to females, nor to schools or colleges not keeping boarders, nor to schools keeping less than ten student boarders. A copy of this article shall be framed and hung on display in every college or school to which it applies. (1913, c. 169, s. 3; C. S., s. 4219.)

§ 14-38. **Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.** — In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the State shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony. (1913, c. 169, s. 8; C. S., s. 4220.)

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.—It shall be unlawful for any person, firm or corporation, or any individual, male or female, or its or their agents, to kidnap or cause to be kidnapped any human being, or to demand a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or to hold any human being for ransom: Provided, however, that this section shall not apply to a father or mother for taking into their custody their own child.

Any person, or their agent, violating or causing to be violated any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life.

Any firm or corporation violating, or causing to be violated through their agent or agents, any of the provisions of this section, and upon being found guilty, shall be liable to the injured party suing therefor, the sum of twenty-five thousand dollars (\$25,000), and shall forfeit its or their charter and right to do business in the State of North Carolina. (1933, c. 542.)

Definition.—Under this section kidnapping is the taking and carrying away of a human being by physical force or by fraud, done unlawfully or without lawful authority, and a charge to jury defining the offense as forcibly taking and carrying away of a human being is erroneous as being incomplete definition of the crime. *State v. Witherington*, 226 N. C. 211, 37 S. E. (2d) 497 (1946).

Taking and Carrying Away.—Under this section, regardless of the means used, by which the taking and carrying away of a human being is effected, there must be further finding that such taking and carrying away was unlawful or done without lawful authority, or effected by fraud. *State v.*

Witherington, 226 N. C. 211, 37 S. E. (2d) 497 (1946).

Section Increases Maximum Punishment.—The effect of this section, repealing § 4221 of the Consolidated Statutes of North Carolina, relating to the crime of kidnapping, is to increase, within the discretion of the court, the maximum punishment for the crime from twenty years to life, and not to make a life term mandatory upon conviction, the intent of the statute to this effect being shown by the use of the word "punishable" in prescribing the sentence. *State v. Kelly*, 206 N. C. 660, 175 S. E. 294 (1934).

Cited in *State v. Streeton*, 231 N. C. 301, 56 S. E. (2d) 649 (1949).

§ 14-40. Enticing minors out of the State for the purpose of employment.—If any person shall employ and carry beyond the limits of this State any minor, or shall induce any minor to go beyond the limits of this State, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred and not more than one thousand dollars for each offense. The fact of the employment and going out of the State of the minor, or of the going out of the State by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the State is a minor. (1891, c. 45; Rev., s. 3630; C. S., s. 4222.)

Count Joined with One under § 14-41.—An indictment for abduction, containing two counts, one under this section and the second under § 14-41, cannot be quashed for misjoinder of two different offenses, as

the two counts are merely statements of the same transaction to meet the different phases of proof. *State v. Burnett*, 142 N. C. 577, 55 S. E. 72 (1906).

§ 14-41. Abduction of children.—If any one shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the

State's prison for a period not exceeding fifteen years. (1879, c. 81; Code, s. 973; Rev., s. 3358; C. S., s. 4223.)

Definition.—Abduction under this section, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518 (1890); *State v. Burnett*, 142 N. C. 577, 55 S. E. 72 (1906).

This section is broad and comprehensive in its terms, and embraces all means by which the child may be abducted. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518 (1890).

Intent.—There is nothing in this section which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced to leave its custodian. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518 (1890).

Force Not Necessary.—In a prosecution under this section it is not necessary for the State to show that the child was carried away by force. *State v. Ashburn*, 230 N. C. 722, 55 S. E. (2d) 333 (1949).

Father's Consent a Good Defense.—If the carrying away was with the father's

consent, that fact is a defense the burden of which is upon the defendant. *State v. Burnett*, 142 N. C. 577, 55 S. E. 72 (1906).

The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of her father, *State v. Burnett*, 142 N. C. 577, 55 S. E. 72 (1906), nor that the defendant was not a nearer relation to the child than the person from whose custody it was abducted. *State v. George*, 93 N. C. 567 (1885).

Evidence that defendant induced a minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction. *State v. Ashburn*, 230 N. C. 722, 55 S. E. (2d) 333 (1949).

Use of Wrong Expression in Charge to Jury.—The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." *State v. Truelove*, 224 N. C. 147, 29 S. E. (2d) 460 (1944).

§ 14-42. Conspiring to abduct children.—If any one shall conspire to abduct, or by any means to induce any child under the age of fourteen years, who shall reside with any of the persons designated in § 14-41, or shall reside at school, to leave such persons or the school, he shall be guilty of a felony, and on conviction shall be punished as prescribed in that section: Provided, that no one who may be a nearer blood relation to the child than the persons named in § 14-41 shall be indicted for either of said offenses. (1879, c. 81, s. 2; Code, s. 974; Rev., s. 3359; C. S., s. 4224.)

Cross References.—As to application of this section, see annotations to § 14-41. As to persuading children to leave any

State institution to which they have been legally committed, see § 14-266.

§ 14-43. Abduction of married women.—If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman. (1903, c. 362; Rev., s. 3360; C. S., s. 4225.)

Elopement Defined.—Elopement of wife is her voluntary act in deserting her husband to go away with and cohabit with another man. *State v. O'Higgins*, 178 N. C. 708, 100 S. E. 438 (1919).

Effect of Prior Adultery.—In order to constitute the offense of abducting or eloping with a married woman, under this section, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to

be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it was shown that the wife had not thus yielded herself to any other man than the defendant. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769 (1923).

Adultery after the elopement is an es-

sential element of the offense under this section. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784 (1928).

Voluntary Leaving of Husband.—The fact that the wife had voluntarily left her husband falls within the definition of this section when this results from the unlawful scheming of the man to achieve that end. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769 (1923).

Evidence.—Evidence tending to show that the defendant knew of the whereabouts of the wife of another after she had left her husband, and that they had dined together at a house of ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784 (1928).

In a prosecution under this section the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilt beyond a reasonable doubt. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784 (1928).

Testimony of Wife Supported by Others.—The provision of this section that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769 (1923).

Evidence of Influence of Defendant.—Upon the question of influence of the defendant over the wife of another whom he is being tried for abducting and eloping with, it is competent to show the strength

of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that the abducted woman had used her own money for expenses, is not subject to just exception. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769 (1923).

Testimony of Husband as to Chastity.—On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home; such testimony may be sufficient to sustain a conviction. *State v. O'Higgins*, 178 N. C. 708, 100 S. E. 438 (1919); *State v. Hopper*, 186 N. C. 405, 119 S. E. 769 (1923).

Woman's General Character for Virtue Admissible.—In an indictment under this section, where the character of the woman is by express terms of the statute directly in question, evidence as to her general character for virtue is admissible. *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (1906).

Burden of Proof of First Proviso.—The state has the burden of proving the facts required under the first proviso of the section. *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (1906).

Instruction—"Bad" House.—Where the evidence is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house or "house of ill fame," where this was not brought to his attention at the time. *State v. Ashe*, 196 N. C. 387, 145 S. E. 784 (1928).

ARTICLE 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.—If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court. (1881, c. 351, s. 1; Code, s. 975; Rev., s. 3618; C. S., s. 4226.)

Section relates to destruction of child. *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842 (1943).

This section and § 14-45 create separate and distinct offenses, the first statute being designed to protect the life of a child in ventre sa mere, and the second being

primarily for the protection of the woman. *State v. Jordon*, 227 N. C. 579, 42 S. E. (2d) 674 (1947); *State v. Green*, 230 N. C. 381, 53 S. E. (2d) 285 (1949).

The words "either pregnant or quick with child" contained in this section mean "pregnant with child that is quick," since

otherwise the words "or quick with child" would be merely confusing surplusage, and since the sine qua non of the offense is the intent to destroy the child in ventre sa mere, which must be quick before it has independent life. *State v. Jordon*, 227 N. C. 579, 42 S. E. (2d) 674 (1947); *State v. Green*, 230 N. C. 381, 53 S. E. (2d) 285 (1949). But see, *State v. Slagle*, 83 N. C. 630 (1880).

Thus, evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within thirty days after she had conceived, is insufficient to be submitted to the jury in a prosecution under this section since in such instance the child could not be quick. *State v. Jordon*, 227 N. C. 579, 42 S. E. (2d) 674 (1947).

Elements of Offense—Intent.—The essential ingredients of the offense is the intent and not the noxious nature of the drug used. *State v. Crews*, 128 N. C. 581, 38 S. E. 293 (1901); *State v. Shaft*, 166 N. C. 407, 81 S. E. 932 (1914).

Same—Abortion or Procuring Abortion.—It is just as much a crime to produce an abortion under the advice of and with means furnished by another, as it is to have an abortion performed by another. The gravamen of the offense is the abortion, or the procuring of the abortion, and not the manner by which it is accomplished. *Parker v. Edwards*, 222 N. C. 75, 21 S. E. (2d) 876 (1942).

Same—Prescribing or Advising.—For a conviction under this section it is not essential to show that defendant procured the drug or that the woman used it. If defendant prescribed or advised its use with the illegal intent, that alone is sufficient. *State v. Powell*, 181 N. C. 515, 106 S. E. 133 (1921).

Same—Procuring Drug.—Under this section it is not necessary to charge or prove that the accused procured the drug. *State v. Crews*, 128 N. C. 581, 38 S. E. 293 (1901).

Same—Nature of Drug.—It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. *State v. Crews*, 128 N. C. 581, 38 S. E. 293 (1901). For the offense is committed by administering any substance with intent to procure an abortion. *State v. Shaft*, 166 N. C. 407, 81 S. E. 932 (1914).

Woman Not an Accomplice.—The woman is not, in a legal sense, an accomplice, whether or not she consents to the abortion. *State v. Shaft*, 166 N. C. 407, 81 S. E. 932 (1914).

Statement of Woman as to Payment of Doctor's Fee.—The testimony as to the

statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and § 14-45, that the defendant had paid the physician one-half of the \$200 fee he had charged for such services, uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence, whether they were understood by him, whether he denied them or remained silent. *State v. Martin*, 182 N. C. 846, 109 S. E. 74 (1921).

Admissibility of Statement Made Four Months Prior to Abortion.—Upon the trial of a physician for procuring an abortion, testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. *State v. Brown*, 202 N. C. 221, 162 S. E. 216 (1932).

Evidence of Disease Facilitating Abortion Properly Excluded.—Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant's guilt as charged in the indictment. There was no error in the exclusion of such evidence. *State v. Evans*, 211 N. C. 458, 190 S. E. 724 (1937).

Admission of evidence that woman took an anaesthetic was not prejudicial. *State v. Evans*, 211 N. C. 458, 190 S. E. 724 (1937).

Sufficiency of Evidence.—Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine or substance with intent to destroy the child is sufficient for a conviction under this section. *State v. Powell*, 181 N. C. 515, 106 S. E. 133 (1921).

Testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. *State v. Martin*, 182 N. C. 846, 109 S. E. 74 (1921).

Variance.—On the trial of an indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, where the proof tends to show the performance

of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and defendant's motion for nonsuit should be allowed. *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842 (1943).

Where warrant charged that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, and the evidence tended to show that this was prior to the time the child was quick, nonsuit for fatal variance should have been allowed. *State v. Green*, 230 N. C. 381, 53 S. E. (2d) 285 (1949).

Joinder of Offenses.—Where the defendant is tried under this section and § 14-45, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. *State v. Martin*, 182 N. C. 846, 109 S. E. 74 (1921).

Upon the trial on an indictment charging

the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered; and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby. *State v. Dilliard*, 223 N. C. 446, 27 S. E. (2d) 85 (1943).

Prejudicial Evidence.—In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions was held incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial. *State v. Gavin*, 232 N. C. 323, 59 S. E. (2d) 823 (1950).

Cited in *State v. Geurukus*, 193 N. C. 642, 143 S. E. 208 (1928).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court. (1881, c. 351, s. 2; Code, s. 976; Rev., s. 3619; C. S., s. 4227.)

Cross Reference.—See annotations under § 14-44.

Generally.—This section relates to miscarriage of, or to injury to, or destruction of the woman. *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842 (1943).

Evidence.—In a prosecution for aiding and abetting in an abortion, it was held that the evidence was sufficient to take the case to the jury. *State v. Manning*, 225 N. C. 41, 33 S. E. (2d) 239 (1945); *State v. Choate*, 228 N. C. 491, 46 S. E. (2d) 476 (1948).

Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show animus; but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. *State v. Choate*, 223 N. C. 491, 46 S. E. (2d) 476 (1948).

Cited in *State v. Gavin*, 232 N. C. 323, 59 S. E. (2d) 823 (1950).

§ 14-46. Concealing birth of child.—If any person shall, by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or State's prison, at the discretion of the court: Provided, that the imprisonment in the State's prison shall in no case exceed a term of ten years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. Any person aiding, counseling or abetting any woman in concealing the birth of her child shall be guilty of a misdemeanor. (21 Jac. I, c. 27; 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31,

s. 14; 1818, c. 985, P. R.; R. C., c. 34, s. 28; 1883, c. 390; Code, s. 1004; Rev., s. 3623; C. S., s. 4228.)

Editor's Note.—Under the section as it stood after the amendment of 1818, the offense was the concealing of the death of a being on whom murder could have been committed. If, therefore, the child was stillborn, concealment would be no offense. The burden of showing that fact would, however, be on the defendant. *State v. Joiner*, 11 N. C. 350 (1826).

And a former conviction for concealing the birth of a child is no defense to an indictment for the murder of such child. *State v. Morgan*, 95 N. C. 641 (1886). See also 2 Enc. Dig. 328 et seq.

Evidence Insufficient for Directed Verdict.—Under the provisions of this section

making it a felony for any person to conceal the birth of a newborn child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. *State v. Arrowood*, 187 N. C. 715, 122 S. E. 759 (1924).

ARTICLE 12.

Libel and Slander.

§ 14-47. **Communicating libelous matter to newspapers.**—If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor. (1901, c. 557, ss. 2, 3; Rev., s. 3635; C. S., s. 4229.)

Cross References.—As to the truth of allegations in indictment for libel as a defense, see § 15-168. As to libel by a newspaper, see §§ 99-1 and 99-2. As to derogatory reports about banks, see §§ 53-128 and 53-129. As to derogatory statements about building and loan associations, see § 54-44.

Responsibility of Newspapermen. — "This statute punishes criminally the person who communicates libelous matter to newspapers, but that does not excuse the newspaper for publishing such libels, and the newspaper is responsible in damages

for the injury done by the publication. Newspapermen, however, are not so apt to be prosecuted criminally for libel unless the publication attempts to destroy the reputation of an innocent woman by words which amount to charge of incontinency (under § 14-48), or unless there is a willful derogatory statement about the financial condition of a bank (under § 54-44)." 4 N. C. Law Rev. 27.

Cited in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850 (1942).

§ 14-48. **Slandering innocent women.**—If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor. (1879, c. 156; Code, s. 1113; Rev., s. 3640; C. S., s. 4230.)

Cross Reference.—As to civil liability for charging innocent women with incontinency, see § 99-4 and annotation thereto.

Object of Statute. — The object of the legislature in enacting this section was to protect the character of innocent women, that is, chaste and virtuous women, against wanton and malicious attempts to destroy their reputation by charges of incontinency. *State v. Aldridge*, 86 N. C. 680 (1882).

Essential Elements of Offense.—The innocence and virtue, then, of the woman who is subject of the attempt, lie at the very foundation of the offense, and consti-

tute its most essential element. *State v. McDaniel*, 84 N. C. 803 (1881); *State v. Aldridge*, 86 N. C. 680 (1882); *State v. Smith*, 155 N. C. 473, 71 S. E. 305 (1911).

What Constitutes Offense.—The offense of slandering an innocent woman consists in the attempt to destroy the reputation of an innocent woman by a charge of incontinency. *State v. Davis*, 92 N. C. 764 (1885).

It consists not in the slander of a woman falsely by charging her with incontinency, but in the attempt to destroy her reputation by such means. *State v. McDaniel*, 84 N. C. 803 (1881).

Same—Sufficiency.—And to constitute this offense, it is necessary to prove that the words alleged to have been spoken amounted to a charge of actual, definitive, illicit sexual intercourse. *State v. Moody*, 98 N. C. 671, 4 S. E. 119 (1887).

“Innocent Woman.”—An “innocent woman,” within the meaning of this section, is one who has never had sexual intercourse with any man, *State v. Malloy*, 115 N. C. 737, 20 S. E. 461 (1894); one who had never had actual illicit intercourse with any man, *State v. Davis*, 92 N. C. 764 (1885); *State v. Brown*, 100 N. C. 519, 6 S. E. 568 (1888); a pure woman—one whose character is “unsullied,” *State v. McDaniel*, 84 N. C. 803 (1881); a woman who, at the time the alleged slanderous charge was made, and at the time of the trial therefor, was chaste and virtuous, *State v. Grigg*, 104 N. C. 882, 10 S. E. 684 (1889).

Improper Conduct Short of Incontinency.—Mere lasciviousness, and the permission of liberties by men with her, although we might consider them improper, were not contemplated by the statute. *State v. Davis*, 92 N. C. 764 (1885).

And a woman who has never had actual sexual intercourse with any one is an innocent woman, within the meaning of this section, even though she and a man were surprised in each other’s embrace, about to commit the act of copulation, but before it took place. *State v. Hinson*, 103 N. C. 374, 9 S. E. 552 (1889).

Status of Reformed Women.—The question whether to slander a woman who had once lapsed from virtue, but who had reformed and led an exemplary life, would be a crime under this statute, was discussed but undecided in *State v. Davis*, 92 N. C. 764 (1885), the court expressing the opinion that in view of the strict construction put on the statute it would seem to exclude from the protection of its provisions every woman who had, at some time of her life, made a slip in her virtue, even though she had afterwards reformed.

Fortunately, however, the question was finally decided in favor of the reformed woman and the present law is that the fact that a woman at some former period in her life had departed from the path of virtue,

will not per se entitle a defendant, indicted under the statute, to an acquittal; on the contrary, if the prosecutrix has satisfied the jury that she has reformed and led an exemplary life, she is entitled to the protection of the law. *State v. Grigg*, 104 N. C. 882, 10 S. E. 684 (1889).

Status of Seduced Women.—“A man cannot seduce a virtuous woman and then slander her with impunity, and, when indicted for such slander, claim protection against the penalties of law by pleading her disgrace, which he had caused to be brought upon her. The statute would fail to give that protection to innocent women, that was intended, if this was allowed.” *State v. Misenheimer*, 123 N. C. 758, 31 S. E. 852 (1898).

And a woman, seduced before marriage, but whose character was good before and since marriage, with this exception, is an “innocent woman” under this section. *State v. Grigg*, 104 N. C. 882, 10 S. E. 684 (1889); *State v. Misenheimer*, 123 N. C. 758, 31 S. E. 852 (1898).

Slander by Husband.—*State v. Edens*, 85 N. C. 522 (1881), holding that a husband is not indictable for slandering his wife, is overruled, and now, he is indictable under this section, if he wantonly and maliciously slanders his wife. *State v. Fulton*, 149 N. C. 485, 63 S. E. 145 (1908).

Malice Implied.—Where a slanderous charge is made, malice is implied, except in case of a privileged communication. *State v. Malloy*, 115 N. C. 737, 20 S. E. 461 (1894).

Burden of Proof.—The burden is upon the State to show that an innocent and virtuous woman has been slandered in order to convict under the provisions of this section. *State v. Smith*, 155 N. C. 473, 71 S. E. 305 (1911).

On trial of an indictment for slander under this section, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant. *State v. McDaniel*, 84 N. C. 803 (1881).

ARTICLE 13.

Injuring Others by Use of High Explosives.

§ 14-49. **Wilful injury a felony; punishment.**—Any person who shall wilfully and maliciously injure or attempt to injure any person, or any building, equipment, real or personal property of any kind or nature belonging to another

person, firm or corporation, by the use of nitroglycerine, dynamite, gunpowder or other high explosive, shall be guilty of a felony, and on conviction shall be punished by imprisonment in the State prison for not less than five years and not more than thirty years. (1923, c. 80, s. 1; C. S., s. 4231(a); 1951, c. 1126, s. 1.)

Editor's Note.—The 1951 amendment re-wrote this section.

§ 14-50. Conspiracy declared a felony; punishment.—If any two or more persons shall conspire to wilfully and maliciously injure any person, or any building, equipment, real or personal property of any kind or nature belonging to another person, firm or corporation, by the use of nitroglycerine, dynamite, gunpowder, or other high explosive, each and everyone so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the State prison for not more than fifteen years. (1923, c. 80, s. 2; C. S., s. 4231(b); 1951, c. 1126, s. 1.)

Editor's Note.—The 1951 amendment re-wrote this section.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.—There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. (1889, c. 434, s. 1; Rev., s. 3331; C. S., s. 4232.)

Cross References. — As to power of an individual to arrest a burglar, see § 15-40. As to accessories, see § 14-5 et seq. As to breaking into or entering jails with intent to kill or injure prisoners therein, see § 14-221.

In General. — Burglary, as defined at common law, was a capital offense, i. e., the breaking into and entering of the "mansion or dwelling house of another in the nighttime, with an intent to commit a felony therein," whether the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923); *State v. Morris*, 215 N. C. 552, 2 S. E. (2d) 554 (1939).

The crime of burglary at common law was composed of five distinct elements, which were: (1), the breaking; (2), the en-

tering; (3), that the breaking and entry be into a mansion house; (4), that the breaking and entering were in the nighttime, and (5), that the breaking and entering were with the intent to commit a felony. *State v. Whit*, 49 N. C. 349 (1857).

Burglary is a common-law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein and whether the building is occupied at the time affects only the degree. *State v. Mumford*, 227 N. C. 132, 41 S. E. (2d) 201 (1947).

The purpose of the statute is to protect the habitations of men, where they repose and sleep, from meditated harm. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

The sleeping apartment referred to in this section is one in which a person regularly sleeps. *State v. Foster*, 129 N. C. 704, 40 S. E. 209 (1901).

Curtilage. — The meaning of the term curtilage is a piece of ground, either inclosed or not, that is commonly used with the dwelling house. *State v. Twitty*, 2 N. C. 102 (1794).

Indictment Must Charge Intended Felony.—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be charged or proven. *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923).

Same—Proof of a Different Intent.—An averment in an indictment for burglary, that the breaking was with the intent to commit larceny, is supported by proof that the entry was made with a purpose to commit a robbery. *State v. Halford*, 104 N. C. 874, 10 S. E. 524 (1889). The intent may be shown by circumstances. *State v. McBryde*, 97 N. C. 393, 1 S. E. 925 (1887).

Indictment Must Charge Occupancy. — The indictment charging the offense alleging that the dwelling house was in the actual occupation of someone at the time of the commission of the crime, was not required at common law, nor under § 14-53, but now, under the provisions of this section omission of that averment makes the indictment good only as an indictment for burglary in the second degree. *State v. Fleming*, 107 N. C. 905, 12 S. E. 131 (1890).

Burglary can not be committed in a tent or booth erected in a market or fair, although the owner lodges in it. See 1 Hawk. Pl. Cr., Ch. 38, § 35; 1 Hale Pl. Cr. 559; Roscoe Cr. Ev., 300. *State v. Jake*, 60 N. C. 471 (1864).

Burglary in a Store with Sleeping Quarters.—The offense of burglary may be committed by breaking into a store if there are sleeping quarters in the store, for the sleeping there makes it a dwelling. *State v. Foster*, 129 N. C. 704, 40 S. E. 209 (1901).

Value of Goods Stolen Immaterial. — A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than \$20.00 is no defense to the capital charge, the provision of § 14-72, dividing larceny into two degrees, by its terms having no application to burglary. *State v. Richardson*, 216 N. C. 304, 4 S. E. (2d) 852 (1939).

Charging Elements of First and Second Degree. — Where a burglarious breaking

into a dwelling house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous. *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923).

Where there is evidence of a burglarious entry into a dwelling house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923).

Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible is without error. *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940).

Discretionary Power of the Jury as to Degree.—The jury does not have the discretionary power to return a verdict of burglary in the second degree if all the evidence shows burglary in the first degree. But under an indictment for burglary in the first degree a verdict of second degree burglary may be returned if the evidence shows such an offense. *State v. Fleming*, 107 N. C. 905, 12 S. E. 131 (1890).

Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized. *State v. Alston*, 113 N. C. 666, 18 S. E. 692 (1893); *State v. Johnston*, 119 N. C. 883, 26 S. E. 163 (1896). See § 15-171 and notes thereto.

One charged with burglary in the first degree and having admitted the entering and taking, the only question is whether it was done at nighttime, and the jury should not be charged that they could convict of a lesser offense as provided by this section, for the offense was either burglary in the first degree or larceny. *State v. McKnight*, 111 N. C. 690, 16 S. E. 319 (1892).

Sufficient Evidence to Submit Question of First Degree Burglary to Jury. — Evidence that the house was broken into by forcing the door open, that the time was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that tracks in the freshly fallen snow were followed

and led to the defendant's room in another house in a distant part of the city, where defendant was apprehended, is held sufficient to be submitted to the jury on the question of defendant's guilt of burglary in the first degree. *State v. Oakley*, 210 N. C. 206, 186 S. E. 244 (1936).

Evidence held sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

Sufficient Evidence to Submit Question of Second Degree Burglary. — Evidence that the defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, is sufficient to be submitted to the jury on the charge of second degree burglary, the method of entry being a constructive "breaking". *State v. Rodgers*, 216 N. C. 572, 5 S. E. (2d) 831 (1939).

The jury may convict of an attempt to commit burglary in the second degree where the prosecution is for burglary in the first degree. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside. — Where defendant was tried for burglary in the second degree on indictment charging burglary in the first degree, and the verdict, as rendered, showed defendant was convicted of burglary in the first degree, or was guilty "as charged in the bill of indictment," the fact that clerk certified "that defendant was guilty of second degree burglary as charged in the bill of indictment" which was merely the clerk's interpretation of verdict, rather than a precise certification of it, was not sufficient to deny motion to set aside verdict. *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111 (1946).

Submission of Question of Guilt of Non-

burglarious Breaking.—The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that a window of the room in which felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. **Held:** Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. *State v. Chambers*, 219 N. C. 442, 11 S. E. (2d) 280 (1941).

Applied in *State v. Robertson*, 210 N. C. 266, 186 S. E. 247 (1936); *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

Cited in *State v. Lawrence*, 199 N. C. 481, 154 S. E. 741 (1930); *State v. Hamlet*, 206 N. C. 568, 174 S. E. 451 (1934); *State v. Brown*, 206 N. C. 747, 175 S. E. 116 (1934); *State v. Stevenson*, 212 N. C. 648, 194 S. E. 81 (1937); *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666 (1949).

§ 14-52. Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court. (1870-1, c. 222; Code, s. 994; 1889, c. 434, s. 2; Rev., s. 3330; C. S., s. 4233; 1941, c. 215, s. 1; 1949, c. 299, s. 2.)

Cross References.—As to jury returning verdict for second degree burglary when first degree was charged in the indictment, see § 15-171 and annotation thereto. See also, annotation to § 14-51.

Editor's Note.—The 1941 amendment in-

serted the proviso, which was rewritten by the 1949 amendment, commented on in 27 N. C. Law Rev. 449.

It is error for the court to fail to charge the jury in a prosecution for burglary in the first degree that it may return a verdict

of guilty of burglary in the first degree with recommendation of imprisonment for life. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666 (1949).

Permissible Verdicts When Jury Finds Facts Constituting Burglary in First Degree.—Taking §§ 14-52 and 15-171 together, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury “deem it proper so to do,” guilty of burglary in the second degree, for which

the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666 (1949).

Formerly a verdict of guilty of burglary in the first degree made a death sentence mandatory. But since the enactment of the proviso in 1941, when the jury recommends imprisonment for life, the death penalty is thereby eliminated, and sentence of life imprisonment is mandatory. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666 (1949).

Applied in *In re McKnight*, 229 N. C. 303, 49 S. E. (2d) 753 (1948).

Quoted in *State v. Oakley*, 210 N. C. 206, 186 S. E. 244 (1936); *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940).

Cited in *State v. Lawrence*, 199 N. C. 481, 154 S. E. 741 (1930); *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111 (1946).

§ 14-53. Breaking out of dwelling house burglary.—If any person shall enter the dwelling house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of such dwelling house in the nighttime, such person shall be guilty of burglary. (12 Anne, c. 7, s. 3; R. C., c. 34, s. 8; Code, s. 995; Rev., s. 3332; C. S., s. 4234.)

Indictment Must Charge Breaking Out.—One charged by indictment of breaking into a house cannot be convicted of break-

ing out, and a charge of the court to that effect is error. *State v. McPherson*, 70 N. C. 239 (1874).

§ 14-54. Breaking into or entering houses otherwise than burglariously.—If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking-house, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. (1874-5, c. 166; 1879, c. 323; Code, s. 996; Rev., s. 3333; C. S., s. 4235.)

Intent Must Be Shown.—In order to convict under this section it is necessary to show intent and a failure to show intent leaves no other course except acquittal. *State v. Spear*, 164 N. C. 452, 79 S. E. 869 (1913), disapproving dictum in *State v. Hooker*, 145 N. C. 581, 59 S. E. 866 (1907). And see *State v. Crisp*, 188 N. C. 799, 125 S. E. 543 (1924).

Felonious intent is an essential element of the crime defined in this section. It must be alleged and proved, and the felonious intent proven must be the felonious intent alleged, which is the “intent to steal.” *State v. Friddle*, 223 N. C. 258, 25 S. E. (2d) 751 (1943).

“Unlawfully Breaking” Charges Intent.—An indictment under this section for house-breaking is sufficient when charging “that defendant did break and enter (otherwise than by burglarious breaking) the

storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., feloniously to steal, etc.” and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words “unlawfully breaking” and “entering with the intent to commit a felony.” *State v. Goffney*, 157 N. C. 624, 73 S. E. 162 (1911).

Intent to Commit More than One Offense.—An indictment for entering a house with an intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. *State v. Christmas*, 101 N. C. 749, 8 S. E. 361 (1888).

Owner Procuring Act to Be Done.—In order to convict of housebreaking under this section there must have been an unlawful entry by the prisoner, and when the

owner has procured the act to be done by the prisoner company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. *State v. Goffney*, 157 N. C. 624, 73 S. E. 162 (1911).

Entry without Breaking. — It is evident it was the intention of the legislature to make it a penal offense to wilfully break into a storehouse where merchandise, etc., is kept, or into an uninhabited house, or to wilfully enter into a dwelling house in the night otherwise than by breaking, with the intent to commit a felony. *State v. Hughes*, 86 N. C. 662 (1882).

Housebreaking or nonburglarious breaking is a statutory and not a common-law offense, and under this section it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking, and therefore while evidence of a breaking, when available, is always relevant proof of a breaking is not essential to sustain conviction. *State v. Mumford*, 227 N. C. 132, 41 S. E. (2d) 201 (1947); *State v. Best*, 232 N. C. 575, 61 S. E. (2d) 612 (1950).

Where defendant was charged under this section with nonburglariously breaking and entering and the evidence showed that he sat in his car while a friend unlawfully entered the house of another, the defendant was a principal in the crime being committed and the fact that his friend did not enter by burglarious breaking is immaterial. *State v. Best*, 232 N. C. 575, 61 S. E. (2d) 612 (1950).

Crime Therein Distinct from Breaking and Entering. — "Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being necessarily distinct from the breaking and entering. *State v. Hooker*, 145 N. C. 581, 59 S. E. 866 (1907).

Indictment under This Section or § 14-51. — Where on appeal defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment under this section. *State v. Locklear*, 226 N. C. 410, 38 S. E. (2d) 162 (1946).

Erroneous Instruction. — The State's evidence tended to show that defendant broke

and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran away when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant is entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. *State v. Feyd*, 213 N. C. 617, 197 S. E. 171 (1938).

Question for the Jury. — Under § 15-40 a person in whose presence a felony is committed has power to arrest the offender. Where some one breaks into the garage of another and the owner of the garage is killed in trying to make the arrest, the question of the offense being committed in his presence should be submitted to the jury. *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644 (1921).

Evidence Sufficient for Conviction. — Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. *State v. Williams*, 187 N. C. 492, 122 S. E. 13 (1924).

Duty of Court to Submit to Jury Question of Guilt Hereunder Where Indictment Charges First Degree Burglary. — Where the evidence is sufficient to justify it upon a bill of indictment charging a defendant with burglary in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering the dwelling house in question at the time and place mentioned in the bill of indictment otherwise than burglariously, and it is error for the court to fail or refuse to do so. *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940).

The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that the window of the room in which the felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a non-burglary breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore

the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a non-burglary breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglary entry constitutes reversible error. *State v. Chambers*, 218 N. C. 442, 11 S. E. (2d) 280 (1940).

Evidence held sufficient to sustain conviction under this section. *State v. Hargett*, 196 N. C. 692, 146 S. E. 801 (1929).

Applied in *State v. Minton*, 228 N. C. 518, 46 S. E. (2d) 296 (1948).

Cited in *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477 (1895) (dis. op.); *State v. Ellsworth*, 130 N. C. 690, 41 S. E. 548 (1902); *State v. Setzer*, 198 N. C. 663, 153 S. E. 118 (1930); *State v. Ratcliff*, 199 N. C. 9, 153 S. E. 605 (1930); *In re McKnight*, 229 N. C. 303, 49 S. E. (2d) 753 (1948).

§ 14-55. Preparation to commit burglary or other housebreakings.

—If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C. S., s. 4236.)

Under this section, the gravamen of the offense is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. *State v. Boyd*, 223 N. C. 79, 25 S. E. (2d) 456 (1943).

But the phrase "without lawful excuse" must be construed in the spirit of this section, and, even though the possession of the pistols and blackjack be unlawful and even though defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, such possession is not within the meaning of this section. *State v. Boyd*, 223 N. C. 79, 25 S. E. (2d) 456 (1943).

Proof of "Intent" or "Unlawful Use" Not Required.—The offense of possessing implements of housebreaking without lawful excuse, does not require the proof of

any "intent" or "unlawful use." *State v. Vick*, 213 N. C. 235, 195 S. E. 779 (1938).

Separate Offenses.—The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, under this section, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898 (1946).

Judicial Knowledge of Housebreaking Implements.—Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898 (1946).

Sufficiency of Evidence. — In *State v. Boyd*, 223 N. C. 79, 25 S. E. (2d) 456 (1943), it was held that the evidence failed to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking, within the terms of this section.

Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. *State v.*

Baldwin, 226 N. C. 295, 37 S. E. (2d) 898 (1946).

A sentence of not less than twenty-five nor more than thirty years upon a plea of guilty of possession of weapons and implements for housebreaking, in violation of this section is within the discretion of the court conferred by the statute, and is not objectionable as a cruel and unusual punishment within the meaning of Art. I, § 14, of the Constitution of North Carolina. *State v. Cain*, 209 N. C. 275, 183 S. E. 300 (1936).

Cited in *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

§ 14-56. Breaking into or entering railroad cars.—If any person shall, with intent to commit larceny or other felony, break any seal upon a railroad car containing any goods, wares, freight or other thing of value, or shall unlawfully and willfully break or enter into any railroad car containing any goods, wares, freight or other thing of value, such person shall upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term not exceeding five years. Any person found unlawfully in such car shall be presumed to have entered in violation of this section. (1907, c. 468; C. S., s. 4237.)

Cited in *State v. Brown*, 198 N. C. 41, 150 S. E. 635 (1929); *State v. Hendricks*, 207 N. C. 873, 178 S. E. 557 (1935).

§ 14-57. Burglary with explosives.—Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as for burglary in the second degree, as provided in § 14-52. (1921, c. 5; C. S., s. 4237(a).)

"Burglary with explosives" was unknown to the common law. Obviously, it is separate and distinct from the crime of burglary named in § 14-51. *United States v. Brandenburg*, 144 F. (2d) 656 (1944).

Applied in *In re McKnight*, 229 N. C. 303, 49 S. E. (2d) 753 (1948).

Cited in *State v. Vick*, 213 N. C. 235, 195 S. E. 779 (1938).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.—Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. (R. C., c. 34, s. 2; 1870-1, c. 222; Code, s. 985; Rev., s. 3335; C. S., s. 4238; 1941, c. 215, s. 2; 1949, c. 299, s. 3.)

Cross References. — As to accomplices, see § 14-5 et seq. As to arrest of offender by Insurance Commissioner and prosecution, see § 69-2.

Editor's Note. — The 1941 amendment added the provision for life imprisonment upon recommendation of the jury. This provision was rewritten by the 1949 amend-

ment, which was commented on in 27 N. C. Law Rev. 449.

By the act of 1869 the punishment for arson was confinement in the penitentiary, but by the act of 1871 a death penalty was fixed. In *State v. Wise*, 66 N. C. 120 (1872), the defendant was convicted and received the death sentence but judgment

was arrested because the indictment did not specify which of the two acts it was found under. The failure to set out in the indictment the date of the offense left a question as to which of the statutes should apply as both of them provided punishment, one for offenses before April 4, 1871, the other for offenses after that date.

Wood Must Be Charred. — Where the statute requires that the building be "burned" an indictment charging "setting fire to" is not sufficient for there can be a setting fire to without charring the wood, as required to constitute burning. But if the statute provides "setting fire to," the indictment charging "setting fire to and burning" is sufficient as the charge of burn-

ing is surplusage and not detrimental to the indictment. *State v. Hall*, 93 N. C. 571 (1885).

Evidence held admissible in prosecution for arson as tending to show ill will towards occupants of house burned and as being part of *res gestae*. *State v. Smith*, 225 N. C. 78, 33 S. E. (2d) 472 (1945).

The death sentence is mandatory upon a verdict of guilty of arson when there is no recommendation by the jury in respect to the punishment. *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

Cited in *State v. Freeman*, 197 N. C. 376, 148 S. E. 450 (1929); *State v. Wilfong*, 222 N. C. 746, 24 S. E. (2d) 629 (1943).

§ 14-59. Burning of certain public and other corporate buildings.

—If any person shall willfully and maliciously burn the Statehouse, or any of the public offices of the State, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the State or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town or corporation, he shall, on conviction, be imprisoned in the State's prison for not less than five nor more than ten years. (1830, c. 41, s. 1; R. C., c. 34, s. 7; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 3; Rev., s. 3344; C. S., s. 4239.)

Intent Necessary.—"If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act of Assembly. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding

the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape." *State v. Mitchell*, 27 N. C. 350 (1845).

§ 14-60. Setting fire to schoolhouse.—If any person shall willfully set fire to any schoolhouse, or procure the same to be done, he shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the State's prison or the county jail, and may also be fined, in the discretion of the court. (1901, c. 4, s. 28; Rev., s. 3345; 1919, c. 70; C. S., s. 4240.)

§ 14-61. Burning or attempting to burn certain bridges and buildings.—If any person, with intent to destroy the same, shall willfully and maliciously set fire to and burn any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall willfully and maliciously attempt to burn any of such houses or bridges, or any of the houses or buildings mentioned in this article, the person offending shall be guilty of a felony and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years. (1825, c. 1278, P. R.; R. C., c. 34, s. 30; Code, s. 985, subsec. 4; Rev., s. 3337; C. S., s. 4241.)

City Market House.—A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they

conflict. The municipal court would have jurisdiction only by express legislation conveying it. *Washington v. Hammond*, 76 N. C. 33 (1877).

§ 14-62. Setting fire to churches and certain other buildings.—If

any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than two nor more than forty years. (1874-5, c. 228; Code, s. 985, subsec. 6; 1885, c. 66; 1903, c. 665, s. 2; Rev., s. 3338; C. S., s. 4242; 1927, c. 11, s. 1.)

- I. In General.
- II. Indictment.
- III. Evidence.
- IV. Questions for Jury.

Cross References.

As to buildings destroyed by a tenant, see § 42-11 and annotation thereto. As to burning crops in fields, see § 14-141. As to burning of ginhouses, tobacco houses, and stables, see § 14-64. As to setting fire to grass and brush lands and woodlands, see § 14-136.

I. IN GENERAL.

Editor's Note.—The 1927 amendment inserted the words “or burn or cause to be burned, or aid, counsel or procure the burning of.”

Crime Fixed Herein Is Separate from That in § 14-66.—A verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a second count brought under § 14-66, the counts being separate and distinct and each requiring proof of facts which the other does not. *State v. Pierce*, 208 N. C. 47, 179 S. E. 8 (1935).

Barn Defined.—A building of hewn logs (twenty-six feet by fifteen), divided by a partition of the same, upon one side of which were horses and upon the other corn, oats and wheat (threshed and unthreshed), also hay, fodder, etc., having sheds adjoining, under which were wagons and other farming utensils, is a “barn” within the meaning of this section. *State v. Cherry*, 63 N. C. 493 (1869).

But a house seventeen feet long and twelve wide, setting on blocks in a stable yard, having two rooms in it—one quite small, used for storing nubbins and refuse corn to be first fed to the stock, and the other used for storing peas, oats, and other products of the farm—is not a barn within the meaning of the statute. *State v. Laughlin*, 53 N. C. 455 (1862).

Burden of Proof on Plea of Not Guilty.—Where a plea of not guilty is entered in a prosecution for common-law arson or for the statutory felony of burning a building contrary to this section it is incumbent on the State to prove both the

fire and the cause of the fire and the connection of the accused with the crime. *State v. Cuthrell*, 233 N. C. 274, 63 S. E. (2d) 549 (1951).

II. INDICTMENT.

“Wantonly and Wilfully” Must Be Charged.—An indictment charged that the defendant “did unlawfully, wilfully and feloniously set fire to and burn a certain ginhouse, belonging to B. and in the possession of one G.” Verdict of guilty and defendant moved in arrest of judgment for that this section had been amended (Laws 1885, chapter 66,) by striking out the words “unlawfully and maliciously” and inserting in lieu thereof “wantonly and wilfully,” and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under this section. *State v. Massey*, 97 N. C. 465, 2 S. E. 445 (1887); *State v. Morgan*, 98 N. C. 641, 3 S. E. 27 (1887). But it is a valid indictment under § 14-64, as was held in *State v. Thorne*, 81 N. C. 555 (1879), cited and followed by *State v. Green*, 92 N. C. 779 (1885). It seems to be the rule that “unlawfully and wilfully” do not answer the requirements under this section but under § 14-64 it is sufficient in the indictment. *State v. Pierce*, 123 N. C. 745, 31 S. E. 847 (1898).

Charge of Particular Intent Not Necessary.—An indictment for burning a mill, under this section, as amended by the Laws of 1885, ch. 66, need not allege that the prisoner set fire to the mill with the intent to injure some particular person. *State v. Rogers*, 94 N. C. 860 (1886).

It was formerly the rule that an indictment under this section for burning a barn must aver that the act was done “with intent thereby to injure or defraud” some person. And an indictment for such offense at common law must charge that the barn contained hay or grain, or is a parcel of the dwelling house. *State v. Porter*, 90 N. C. 719 (1884).

Title to Property Immaterial.—In the indictment it is not necessary to set out that the burned property “was the prop-

erty of" or "was in the possession of" anyone. The constituent element is "wilful and wanton." *State v. Daniel*, 121 N. C. 574, 28 S. E. 255 (1897).

Kind of Building Must Be Specified.—An indictment for burning a ginhouse will not lie under this section as a ginhouse is not specified. An indictment describing the subject of offense as "house" is sufficient to describe a dwelling, and "house" is only used to describe dwellings. This section applies only to specified buildings. *State v. Thorne*, 81 N. C. 555 (1879).

III. EVIDENCE.

In General.—Under an indictment for burning a barn evidence of bad blood for the owner of the barn, footprints, failure of defendant to go to fire when the remainder of the neighborhood was there, the hour defendant arose, and his acts when notified of the fire is admissible and is sufficient to sustain a verdict of guilty. *State v. Allen*, 149 N. C. 458, 62 S. E. 597 (1908).

Admissibility. — On trial under indictment under this section for burning a barn to collect fire insurance thereon, evidence that the defendant at another place, at some indefinite time in the past, had another barn to burn is incompetent and does not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, nor were they a part of the same transaction. *State v. Deadmon*, 195 N. C. 705, 143 S. E. 514 (1928).

Motive or Intent.—"It is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. *State v. King*, 86 N. C. 603 (1882); *State v. Voight*, 90 N. C. 741 (1884); *State v. Smith*, 93 N. C. 516 (1885); *State v. McBrayer*, 98 N. C. 619, 2 S. E. 755 (1887); *State v. McLean*, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721 (1897). But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent." *State v. Morgan*, 136 N. C. 628, 48 S. E. 670 (1904).

Bad Feeling.—It is entirely competent for the State to show motive upon the part of the defendant to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling

existed, and the reason for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should be excluded and the jury carefully cautioned not to regard it as it puts the character of the defendant in issue. *State v. Barrett*, 151 N. C. 665, 65 S. E. 894 (1909).

Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should withdraw the case from the jury. *State v. Freeman*, 131 N. C. 725, 42 S. E. 575 (1902).

The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, is relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. *State v. Rash*, 34 N. C. 382 (1851); *State v. Gailor*, 71 N. C. 88 (1874); *State v. Green*, 92 N. C. 779 (1885); *State v. Thompson*, 97 N. C. 496, 1 S. E. 921 (1887).

Same—Toward Agent.—Ill will toward an agent of the owner of a building is not sufficient to show motive for setting fire to the building, as such evidence is too remote. *State v. Battle*, 126 N. C. 1036, 35 S. E. 624 (1900).

Clark, J., dissents on the ground that malice toward the owner is not necessary to constitute the offense, and though the ill will was remote it was a circumstance to show motive.

Proof of Title Not Necessary.—"Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy. *State v. Gailor*, 71 N. C. 88 (1874); *State v. Jaynes*, 78 N. C. 504 (1878); *State v. Thompson*, 97 N. C. 496, 1 S. E. 921 (1887); *State v. Daniel*, 121 N. C. 574, 28 S. E. 255 (1897)." *State v. Sprouse*, 150 N. C. 860, 64 S. E. 900 (1909).

"This section is copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply 'of' A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification." *State v. Daniel*, 121 N. C. 574, 28 S. E. 255 (1897).

Opinion Evidence as to Origin of Fire.—In a prosecution under this section it is reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion are so simple and readily

understood that it is for the jury to draw the conclusion from testimony as to the facts, and therefore the conclusion is not the subject of opinion testimony. *State v. Cuthrell*, 233 N. C. 274, 63 S. E. (2d) 549 (1951).

Subsequent Attempt to Fire Another Building.—Where the defendant was indicted for setting fire to an outhouse, evidence is competent to show that at the same time an attempt was made to fire a dwelling house near it, the evidence directly connecting the defendant with the latter attempt. *State v. Thompson*, 97 N. C. 496, 1 S. E. 921 (1887).

Bloodhounds.—On the trial of defendant for burning a barn, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, is sufficient evidence of guilt to take the case to the jury. *State v. Thompson*, 192 N. C. 704, 135 S. E. 775 (1926).

IV. QUESTIONS FOR JURY.

Must Be Sufficient Evidence.—The general rule is, if there be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the judge should say so, and, in a criminal case, direct an acquittal. In *State v. Vinson*, 63 N. C. 335 (1869), it is said: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. *State v.*

Rhodes, 111 N. C. 647, 15 S. E. 1038 (1892).

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. *State v. Church*, 202 N. C. 692, 163 S. E. 874 (1932).

On trial for wilfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit is sufficient to be submitted to the jury that defendant had committed the crime, the corpus delicti being reasonably inferable from the circumstances, there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in the presence of officers, under circumstances calling for a reply. *State v. Wilson*, 205 N. C. 376, 171 S. E. 338 (1933).

Intent.—It is prima facie presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary and then "intent" becomes a question for the jury. *State v. Phifer*, 90 N. C. 721 (1884).

Alibi.—The burden of proving an alibi does not rest on the prisoner, but the burden of proving the guilt of the prisoner rests on the State. It is for the jury to decide, and it is only necessary for the prisoner to offer enough evidence to produce in the mind of the jury a reasonable doubt. *State v. Jaynes*, 78 N. C. 504 (1878).

§ 14-63. Burning boats and barges.—If any person, with the intent to destroy the same, shall willfully and maliciously, or for a fraudulent purpose, set fire to and burn any boat, barge or float, whether he be the owner thereof or not, he shall be guilty of a felony and shall be punished by imprisonment in the State's prison for not less than four months nor more than ten years, or fined in the discretion of the court. (1909, c. 854; C. S., s. 4243.)

§ 14-64. Burning of ginhouses, tobacco houses and stables.—Every person convicted of the willful burning of any ginhouse or tobacco house, or any part thereof, or, in the nighttime, of any stable containing a horse or a mule, or cattle, shall be imprisoned in the State's prison not less than two nor more than ten years. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C. S., s. 4244.)

Cross References.—As to burning crops in the field, see § 14-141. As to setting fire to churches and certain other buildings, see § 14-62. As to setting fire to grass and brush lands and woodlands, see §§ 14-136 and 14-137.

Indictment in General.—That any informality will not be grounds for quashing proceeding if the charge is set out in a clear manner and enough matter appears to enable the court to proceed to judgment, see § 15-153. That judgments will

not be vitiated for failure to aver certain unnecessary matter, see § 15-155. *State v. Rogers*, 168 N. C. 112, 83 S. E. 161 (1914).

Necessity of Alleging "Wilful Burning."

—In the case of *State v. Thorne*, 81 N. C. 555 (1879), there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been wilfully done. The court held that the word maliciously was more comprehensive and included wilfully. *State v. Green*, 92 N. C. 779 (1885).

"Nighttime" Must Be Alleged.—An in-

dictment which omits to allege that the burning was in the "nighttime," is defective. *State v. England*, 78 N. C. 552 (1878).

Necessity of Showing Motive.—It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. *State v. Green*, 92 N. C. 779 (1885).

§ 14-65. Fraudulently setting fire to dwelling houses.—If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wilfully and wantonly or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail, and may also be fined, in the discretion of the court. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C. S., s. 4245; 1927, c. 11, s. 2.)

Editor's Note.—The 1927 amendment inserted the words "or burn or cause to be burned, or aid, counsel or procure the burning of."

Specifying Particular Fraudulent Purpose.—Where in a prosecution under this section the indictment charges that the defendant burned his dwelling house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged for a fraudulent purpose, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal. *State v. Morrison*, 202 N. C. 60, 161 S. E. 725 (1932).

Sufficiency of Evidence.—Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic, that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes a motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and is sufficient to be submitted to the jury in a prosecution under this section. *State v. Moses*, 207 N. C. 139, 176 S. E. 267 (1934).

Cited in *State v. Kluttz*, 206 N. C. 726, 175 S. E. 81 (1934).

§ 14-66. Willful and malicious burning of personal property.—Any person who shall wilfully or maliciously burn, or cause to be burned, or aid, counsel, or procure the burning of any goods, wares, merchandise, or other chattels or personal property of any kind, whether the same shall be at the time insured, by any person or corporation against loss or damage by fire, or not, with intent to injure or prejudice the insurer, creditor or the person owning the property, or any other person, whether the same be the property of such person or another, shall be guilty of a felony. (1921, c. 119; C. S., s. 4245(a).)

Cross Reference.—See the note to § 14-62.

Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house

several times during the days preceding the fire, and that the occupants of the car were heard in the house, is held insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under

this section, although there was ample evidence that the fire was of incendiary origin and destroyed personal property of de-

fendant which had been insured by him. *State v. Simms*, 208 N. C. 459, 181 S. E. 269 (1935).

§ 14-67. Attempting to burn dwelling houses and certain other buildings.—If any person shall willfully attempt to burn any dwelling house, uninhabited house, barn, stable or outhouse, or any mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the property of another, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail, and may also be fined, in the discretion of the court. (1876-7, c. 13; Code, s. 985, subsec. 7; Rev., s. 3336; C. S., s. 4246.)

See notes to § 14-64.

In General.—A conviction for burning a ginhouse can be had either under this section or § 14-64. All that is required is a clear statement of the charge and because of §§ 15-153, 15-155 if sufficient matter is set out in the charge, the proceedings will not be quashed, because of use of terms

that have the same meaning as those used in the statute. If the punishment does not exceed that prescribed by either section it is immaterial under which section the conviction was had. *State v. Rogers*, 168 N. C. 112, 83 S. E. 161 (1914).

Cited in *State v. Hampton*, 210 N. C. 283, 186 S. E. 251 (1936).

§ 14-68. Failure of owner of property to comply with orders of public authorities.—If the owner or occupant of any building or premises shall fail to comply with the orders of the chief of the fire department, or of the Insurance Commissioner, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars for each day's neglect. (1899, c. 58, s. 4; Rev., s. 3343; C. S., s. 4247.)

§ 14-69. Failure of officers to investigate incendiary fires.—If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars. (1899, c. 58, s. 5; Rev., s. 3342; C. S., s. 4248.)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinction between grand and petit larceny abolished.—All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny, is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the State's prison for a period not exceeding ten years. (R. C., c. 34, s. 26; Code, s. 1075; Rev., s. 3500; C. S., s. 4249.)

Cross References.—As to larceny from dwelling by breaking and entering, see § 14-51 et seq. As to stealing of aircraft, see § 63-25. As to obtaining property by false pretense, see § 14-100 et seq. As to taking away or injuring exhibits at fairs, see § 14-164. As to robbing fishing nets, see § 113-248. As to theft of property from public libraries, museums, etc., see § 14-398. As to restitution of stolen property to its owner, see § 15-8. As to robbery, see § 14-87.

Intent Necessary. — "To constitute the crime of larceny, there must be an origi-

nal, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be felony by any subsequent misconduct or bad faith on the part of the taker. *State v. Arkle*, 116 N. C. 1017, 21 S. E. 408 (1895)." *State v. Holder*, 188 N. C. 561, 563, 125 S. E. 113 (1924).

Stolen Property Must Be Designated in Indictment. — "There is required a reasonable certainty in the designation of

stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offense." *State v. Clark*, 30 N. C. 226 (1848); *State v. Horan*, 61 N. C. 571 (1868); *State v. Bragg*, 86 N. C. 688 (1882).

Evidence Must Sustain Charge. — A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. *State v. Moore*, 33 N. C. 70 (1850); *State v. Bragg*, 86 N. C. 688 (1882).

One Act Two Offences. — A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offences. *State v. Bynum*, 117 N. C. 749, 23 S. E. 218 (1895); *State v. Bynum*, 117 N. C. 752, 23 S. E. 219 (1895).

Accessories Abolished. — There are no accessories to larceny. All that counsel and aid are guilty of the offence as principals. *State v. Gaston*, 73 N. C. 93 (1875).

Larceny and Malicious Mischief Distin-

guished. — An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. *State v. Butler*, 65 N. C. 309 (1871). See § 14-85.

Exclusive Jurisdiction in Superior Court. — "Under the general law all misdemeanors are punishable by fine and imprisonment at the discretion of the superior court, so by the Constitution the jurisdiction over such offenses appertains exclusively to the superior courts, unless some statute has limited the punishment to a fine not exceeding fifty dollars or imprisonment not exceeding one month. Art. IV, § 15. (Amended Const., Art. IV, § 25)." *Washington v. Hammond*, 76 N. C. 33 (1877).

Sentence Not Excessive.—A sentence to the common jail of the county for a period of 12 months, and an assignment to work the public roads, upon defendant's plea of *nolo contendere* to a charge of stealing an automobile of the value of \$325.00, is not excessive. *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475 (1941).

§ 14-71. Receiving stolen goods. — If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (1797, c. 485, s. 2; R. C., c. 34, s. 56; Code, s. 1074; Rev., s. 3507; C. S., s. 4250; 1949, c. 145, s. 1.)

Editor's Note. — The 1949 amendment substituted "criminal offense" for "misdemeanor". For brief comment on amendment, see 27 N. C. Law Rev. 448.

As to elements of crime of receiving stolen goods, see 26 N. C. Law Rev. 192.

Included in Indictment for Larceny Charge. — An indictment for larceny if concluded at common law may include two counts, one for larceny, the other for receiving stolen goods. The count for receiving stolen goods must conclude against this section. If the offence of larceny charged is punishable by statute with a sentence greater than is provided by this

section and if the count charging larceny concludes against the statute the two counts can not be joined, as the punishment is different, but if the count charging larceny concludes at common law, which provided whipping, the two counts may be joined, for by abolishing whipping the punishment for the two offences was made the same. *State v. Lawrence*, 81 N. C. 522 (1879).

A judgment upon a general verdict of guilty upon an indictment containing two counts — one for horse stealing, under § 14-81, and the other for receiving, under this section, is erroneous—the offenses not

being of the same grade and the punishment being different. *State v. Goings*, 98 N. C. 766, 4 S. E. 121 (1887).

Elements of the Offense.—The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. *State v. Yow*, 227 N. C. 585, 42 S. E. (2d) 661 (1947).

This section makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received are sufficient to lead the party charged to believe they were stolen. *State v. Stathos*, 203 N. C. 456, 181 S. E. 273 (1935).

It is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen. The question involved is whether the person charged had knowledge of the fact that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge under the circumstances. *State v. Stathos*, 208 N. C. 456, 181 S. E. 273 (1935).

In a prosecution under this section, the test of felonious intent is whether the prisoners knew, or must have known, that the goods were stolen, not whether a reasonably prudent person would have suspected strangers calling at a very early morning hour. *State v. Oxendine*, 223 N. C. 659, 27 S. E. (2d) 814 (1943).

The test is as to the knowledge, actual or implied, of the defendant, and not what some other person would have believed from the facts attending the receipt of the goods. *State v. Stathos*, 208 N. C. 456, 181 S. E. 273 (1935).

Guilty knowledge is an essential element of the offense defined by this section, and while such knowledge may be implied or inferred by the jury from the facts and circumstances, it is error for the court to instruct the jury to the effect that defendant would have knowledge within the meaning of the statute if he received the goods under circumstances "such as to cause defendant to reasonably believe or know" that the property had been stolen, "reasonable belief" and "implied knowledge" not being synonymous. *State v. Miller*, 212 N. C. 361, 193 S. E. 388 (1937).

Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under this section, and a charge which fails to submit the question of such intent to the jury entitled defendant to a new trial. *State v. Morrison*, 207 N. C. 804, 178 S. E. 562 (1935).

Interest Not Necessary for Conviction.—It is not necessary that one receiving stolen goods do it for the purpose of making them his own or to derive profit from them, if he receives them to help the thief, as a friendly act he is nevertheless guilty. *State v. Rushing*, 69 N. C. 29 (1873).

Goods Received through Agent.—If stolen goods are received by an agent of the accused, at his instance, that is sufficient to sustain a conviction if he knew that they were stolen goods. *State v. Stroud*, 95 N. C. 626 (1886).

Failure to Prove Ownership of Property.—In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or nonsuit should be allowed. *State v. Pugh*, 196 N. C. 725, 147 S. E. 7 (1929).

The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the charge of this section of receiving said property knowing it to have been feloniously stolen or taken. *State v. Pest*, 202 N. C. 9, 161 S. E. 535 (1931); *State v. Lowe*, 204 N. C. 572, 169 S. E. 180 (1933); *State v. Yow*, 227 N. C. 585, 42 S. E. (2d) 661 (1947).

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. *State v. Larkin*, 229 N. C. 126, 47 S. E. (2d) 697 (1948).

Accessories Abolished.—By abolishing the distinction between petit and grand larceny the offense of accessory after the fact was also abolished, and one receiving stolen goods is treated and punished as principal. *State v. Tyler*, 85 N. C. 569 (1881).

Conviction of Larceny Is Tantamount to Acquittal on Charge of Receiving.—Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, a verdict of guilty of

larceny is tantamount to an acquittal on the charge of receiving. *State v. Holbrook*, 223 N. C. 622, 27 S. E. (2d) 725 (1943).

Verdict Need Not Specify Value of Goods.—In a prosecution under this section, it is not required that the jury should determine the value of the goods in its verdict. *State v. Morrison*, 207 N. C. 804, 178 S. E. 562 (1935).

Defective Verdict.—Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. *State v. Shaw*, 194 N. C. 690, 140 S. E. 621 (1927); *State v. Cannon*, 218 N. C. 466, 11 S. E. (2d) 301 (1940).

Same—Failure to Charge as to Guilty Knowledge.—Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a venire de novo will be ordered on appeal. *State v. Barbee*, 197 N. C. 248, 148 S. E. 249 (1929).

Evidence held sufficient to go to jury upon charge of receiving stolen property with knowledge that it had been feloniously stolen. *State v. Larkin*, 229 N. C. 126, 47 S. E. (2d) 697 (1948).

Punishment.—Prior to the 1949 amendment receiving stolen goods was only a

misdemeanor under this section, but it could be punished as larceny at the discretion of the court. *State v. Brite*, 73 N. C. 26 (1875).

An exception to a judgment of imprisonment in the State's prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, was untenable, in that the judgment was within this section. *State v. Reddick*, 222 N. C. 520, 23 S. E. (2d) 909 (1943).

Upon a plea of nolo contendere to a charge of receiving cigarettes of the value of \$75.00 knowing them to have been stolen, a sentence of imprisonment at hard labor for not less than three years nor more than five years is within the limits prescribed by this section and §§ 14-1 through 14-3, and therefore defendant's contention that the punishment imposed is excessive for the offense charged is not meritorious. *State v. Mounce*, 226 N. C. 159, 36 S. E. (2d) 918 (1946).

Applied in *State v. Whitley*, 208 N. C. 661, 182 S. E. 338 (1935); *State v. Camby*, 209 N. C. 50, 182 S. E. 715 (1935); *State v. Law*, 228 N. C. 443, 45 S. E. (2d) 374 (1947); *State v. Best*, 232 N. C. 575, 61 S. E. (2d) 612 (1950).

Cited in *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103 (1892) (dis. op.); *State v. Brown*, 198 N. C. 41, 150 S. E. 635 (1929); *State v. Ray*, 209 N. C. 772, 194 S. E. 836 (1936); *State v. Conner*, 212 N. C. 668, 194 S. E. 291 (1937); *State v. Law*, 227 N. C. 103, 40 S. E. (2d) 699 (1946); *Factor v. Laubenheimer*, 290 U. S. 276, 54 S. Ct. 191, 78 L. Ed. 151 (1933).

§ 14-72. Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.—The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C. S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2.)

Editor's Note.—Prior to the 1913 amendment this section provided that it should not apply if the larceny was from the person or from the dwelling house by breaking and entering "in the daytime". For decision relating thereto when the breaking and entering was in the nighttime, see *State v. Shuford*, 152 N. C. 809, 67 S. E. 923 (1910). And see *In re Holley*, 154 N. C. 163, 69 S. E. 872 (1910). By the 1913 amendment the words "in the day-

time" were omitted.

The 1941 amendment substituted "fifty dollars" for "twenty dollars," and the 1949 amendment raised the amount to "one hundred dollars". For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 448.

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may

be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. *State v. Spaulding*, 211 N. C. 63, 188 S. E. 647 (1936).

Indictment for Larceny from the Person.—It is not necessary for the indictment to allege that the larceny was from the person for it to be shown. *State v. Bynum*, 117 N. C. 749, 23 S. E. 218 (1895).

Exclusive Jurisdiction in Superior Court.—The crime of larceny is a felony punishable in the State's prison, and a recorder's court, not having jurisdiction thereof, may not make orders disposing of a juvenile "delinquent" under the statute providing for reclamation of such, whether the offense be termed therein a misdemeanor or otherwise, Const., Art. I, §§ 12 and 13; and when such has been attempted, it will be disregarded upon conviction of this offense in the superior court having jurisdiction. *State v. Newell*, 172 N. C. 933, 90 S. E. 594 (1916).

Larceny from the person regardless of the value of the property is within the exclusive jurisdiction of the superior court,

as punishment under § 14-70 may be as much as ten years. *State v. Brown*, 150 N. C. 867, 64 S. E. 775 (1909).

Burglary.—A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than \$20 is no defense to the capital charge, this section dividing larceny into two degrees having no application to burglary. *State v. Richardson*, 216 N. C. 304, 4 S. E. (2d) 852 (1939).

Evidence.—In a prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than \$50 (now \$100) to establish a felony under this section. *State v. Weinstein*, 224 N. C. 645, 31 S. E. (2d) 920 (1944).

Applied in *State v. Davidson*, 124 N. C. 839, 32 S. E. 957 (1899).

Cited in *State v. Corpening*, 207 N. C. 805, 178 S. E. 564 (1935); *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475 (1941); *State v. Jones*, 227 N. C. 47, 40 S. E. (2d) 458 (1946).

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.—The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than one hundred dollars. (1913, c. 118, s. 2; C. S., s. 4252; 1941, c. 178, s. 2; 1949, c. 145, s. 3.)

Cross References.—See note to § 14-72. For subsequent law affecting this section, see § 14-73.1.

Editor's Note.—The 1941 amendment substituted "fifty dollars" for "twenty dol-

lars," and the 1949 amendment raised the amount to "one hundred dollars". For brief comment on 1949 amendment, see 27 N. C. Law Rev. 448.

§ 14-73.1. Jurisdiction generally in cases of larceny and receiving stolen goods; petty misdemeanors.—The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by article 16, subchapter V, chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors, and jurisdiction to hear, try and finally dispose of such offenses committed within their respective territorial jurisdictions, is hereby vested in all courts established by a special act of the legislature or pursuant to the provisions of chapter 7 of the General Statutes which now possess jurisdiction of misdemeanors which are punishable in the discretion of the court. (1949, c. 145, s. 4.)

Editor's Note.—For brief comment on section, see 27 N. C. Law Rev. 448.

§ 14-74. Larceny by servants and other employees.—If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master

thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be fined or imprisoned in the State prison or county jail not less than four months nor more than ten years, at the discretion of the court: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of sixteen years. (21 Hen. VIII, c. 7, ss. 1, 2; R. C., c. 34, s. 18; Code, s. 1065; Rev., s. 3499; C. S., s. 4253.)

Cross Reference.—As to embezzlement, see § 14-90 et seq.

Servant Defined.—In a strict sense all employees are servants but the term servant is usually applied, and meant to apply to one of menial rank. *State v. Higgins*, 1 N. C. 36 (1792).

Trust Relation Necessary.—A person employed as a clerk, who takes goods from his employer's store and sends them to another at a distance to be sold cannot be convicted under this statute as there was no parting with possession by the owner which brought about a trust relation. *State v. Higgins*, 1 N. C. 36 (1792).

Trust Relation Must Be Alleged.—In an indictment under this section, it is necessary to allege that the property was re-

ceived and held by the defendant in trust, or for the use of the owner, and being so held it was feloniously converted or made away with by the servant or agent. *State v. Wilson*, 101 N. C. 730, 7 S. E. 872 (1888).

Averment of Age.—"The averment that the defendant, when committing the act, was not within—that is, was of the age of eighteen years or more, and thus negatives that she was under sixteen years of age—does not invalidate the indictment, although the negative goes beyond the statutory requirement, for the greater includes the less." *State v. Wilson*, 101 N. C. 730, 7 S. E. 872 (1888).

Cited in *State v. Connelly*, 104 N. C. 794, 10 S. E. 469 (1889).

§ 14-75. Larceny of chose in action.—If any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this State or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a crime of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of the same value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of such value. (1811, c. 814, s. 1; R. C., c. 34, s. 20; Code, s. 1064; Rev., s. 3498; C. S., s. 4254; 1945, c. 635.)

Cross Reference.—As to description of stolen money in indictment, see § 15-149.

Editor's Note.—The 1945 amendment substituted the word "crime" for the word "felony" and the words "the same value" for the words "any value" near the middle of the section. It also inserted the word "such" before the word "value" at the end of the section.

Treasury Notes.—Treasury notes issued by the United States Treasury Depart-

ment are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. *State v. Thompson*, 71 N. C. 146 (1874).

Due-Bills.—While a "due-bill" is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this sec-

tion. The larceny of such a paper is indictable. *State v. Campbell*, 103 N. C. 344, 9 S. E. 410 (1889).

A pension check on the United States Treasury comes under this section. *State v. Bishop*, 98 N. C. 773, 4 S. E. 357 (1887).

Larceny of the Instrument and Paper Distinguished.—When a person is indicted for stealing a promissory note or any other chose in action, it is upon the State to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid before the alleged felonious taking, the indictment charging only larceny of a chose in action is not sufficient to convict. *State v. Campbell*, 103 N. C. 344, 9 S. E. 410 (1889).

Charter of Bank Issuing Immaterial.—If a stolen note was issued by a bank within one of the United States, it is within the letter of the act, and there can not be the slightest doubt but that it is also within its spirit and meaning. The act is silent as

to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a bona fide holder is the same, whether it derives its existence from an act of Congress or from the legislature of New York. *State v. Banks*, 61 N. C. 577 (1868).

Sufficient Description.—An indictment for larceny which describes the thing stolen, as “one promissory note issued by the Treasury Department of the government of the United States for the payment of one dollar,” is in that respect sufficient. *State v. Fulford*, 61 N. C. 563 (1868).

Amount Must Be Set Out.—An indictment for stealing a bank note is sufficient if it states the amount of the note and what bank it was drawn on. Some cases hold that the mere statement of the amount of the note is sufficient description. *State v. Rout*, 10 N. C. 618 (1825).

Cited in *State v. Freeman*, 88 N. C. 469 (1883).

§ 14-76. Larceny, mutilation, or destruction of public records and papers.—If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper-writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor. (8 Hen. VI, c. 12, s. 3; R. C., c. 34, s. 31; 1881, c. 17; Code, s. 1071; Rev., s. 3508; C. S., s. 4255.)

In General.—An indictment will lie under this section for changing, injuring or obliterating tax books, and the oral testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circumstances to show his guilt. *State v. Gouge*, 157 N. C. 602, 72 S. E. 994 (1911).

Nomenclature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with § 14-3 the offense prescribed by this section is punishable by imprisonment in

the penitentiary, and therefore a felony. *State v. Harwood*, 206 N. C. 87, 173 S. E. 24 (1934).

Must Show Offense Committed on Day of Opportunity.—On a trial under this section for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was com-

mitted on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. *State v. Swinson*, 196 N. C. 100, 144 S. E. 555 (1928).

§ 14-77. Larceny, concealment or destruction of wills.—If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor. (R. C., c. 34, s. 32; Code, s. 1072; Rev., s. 3510; C. S., s. 4256.)

Cross Reference.—As to clerk's power to compel production of will when one in whose custody it is refuses to produce it, see § 31-15.

Basis.—Obviously the basis for making the fraudulent suppression of a will a crime as provided by this section is the fact that

it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. *Wells v. Odum*, 207 N. C. 226, 176 S. E. 563 (1934).

§ 14-78. Larceny of ungathered crops.—If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly. (1811, c. 816, P. R.; R. C., c. 34, s. 21; 1868-9, c. 251; Code, s. 1069; Rev., s. 3503; C. S., s. 4257.)

At Common Law.—By the common law, larceny can not be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and the produce of land. *State v. Foy*, 82 N. C. 679 (1880); *State v. Thompson*, 93 N. C. 537 (1885).

What Indictment Must Allege.—On trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, is not admissible. To render such evidence competent, the indictment should be framed under the statute, and described the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. *State v. Bragg*, 86 N. C. 688 (1882).

In the case of *State v. Liles*, 78 N. C. 496 (1878), the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc., and the words "cultivated for food or market," were omitted, and it was held by this court that the indictment, for that reason, was fatally de-

fective. *State v. Thompson*, 93 N. C. 537 (1885).

Indictment Must Conclude against the Statute.—An indictment for larceny of growing cabbage must conclude against the statute, and a failure to so conclude makes the indictment one at common law. As the offence at common law was not larceny but only a civil trespass there can be no judgment. *State v. Foy*, 82 N. C. 679 (1880).

Applies to All Crops.—This section applies to any growing crops cultivated for food or market, and is not restricted to several articles specifically named. *State v. Ballard*, 97 N. C. 443, 1 S. E. 685 (1887).

Exclusive Jurisdiction of Superior Court.—The punishment for an offence under this section is greater than a justice of the peace can adjudge under the Constitution, Art. IV, § 5. *State v. Cherry*, 72 N. C. 123 (1875). Therefore exclusive jurisdiction is vested in the superior court. *State v. Graham*, 76 N. C. 195 (1877).

§ 14-78.1. Trading for corn without permission of owner of premises.—Any person engaged in traveling from house to house or from place to place, buying or trading for corn, without the permission of the landowner upon whose premises such buying or trading is conducted, shall be guilty of a misde-

meanor, and upon conviction shall be fined or imprisoned in the discretion of the court. This section shall apply only to the counties of Bertie, Columbus, Edgecombe, Halifax, Harnett, Hertford, Nash, Northampton, Wake and Warren. (1951, c. 30.)

§ 14-79. Larceny of ginseng.—If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another person, with intent to steal the same, he shall be guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court: Provided, that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence. (1905, c. 211; Rev., s. 3502; C. S., s. 4258.)

Cross Reference.—As to digging ginseng out of season on the lands of another, see § 14-392.

§ 14-80. Larceny of wood and other property from land.—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (1866, c. 60; Code, s. 1070; Rev., s. 3511; C. S., s. 4259.)

Cross References.—As to cutting, injuring, or removing another's timber, see § 14-135. As to larceny of branded timber, see §§ 80-21 and 80-22.

In General. — This section and § 14-134 were enacted immediately after the Civil War to protect landowners from aimless wanderers who entered land without force, but often did great damage. It was not intended to prevent entry by person who had an honest claim to the land, nor was it intended to apply when force was employed. *State v. Crawley*, 103 N. C. 353, 9 S. E. 409 (1889). It was intended to prevent the willful and unlawful taking from the land of another property that was not by common law or prior statute subject to larceny. *State v. Vosburg*, 111 N. C. 718, 16 S. E. 392 (1892).

The word "whatsoever" shows a clear intent of the legislature to make it general in its application. *State v. Beck*, 141 N. C. 829, 53 S. E. 843 (1906).

The taking of a brass rail from around an engine that is stationary is larceny under this section. The rule in *State v. Burt*, 64 N. C. 619 (1870) in holding that taking a loose nugget of gold from a loose pile of stone is not larceny is not approved. It, although decided after this section was enacted, was probably decided under the common law as this section is not mentioned by the court and in all probability was not called to its attention. *State v. Beck*, 141

N. C. 829, 53 S. E. 843 (1906). In the case of *State v. Graves*, 74 N. C. 396 (1876), it is held that an indictment for trespass to personal property can not be supported for the taking of rails from a fence as the taking is "one continuous act" and is trespass to the realty. *State v. Burt* is cited and approved, and no reference is made to this section. The technical distinction of one continuous act is exactly what was repealed.

One having title to the land or a bona fide claim thereto is not liable under this section by its express terms. One who enters as a servant of a bona fide claimant or one having title is not subject to the application of this section as the protection afforded the master extends to his servant. *State v. Boyce*, 109 N. C. 739, 14 S. E. 98 (1891).

A tenant of seven acres being a part of a tract of thirty five acres claimed by the landlord, when expressly prohibited from cutting timber on any of the tract except the seven acres on which he is a tenant, may as the servant of a third person claiming adversely go on the other part of the tract and cut timber, and he will not be estopped to deny his landlord's title except as to the seven acres leased to him, nor will he be liable under this section if the person whose servant he has been can prove his title or bona fide claim. *State v. Boyce*, 109 N. C. 739, 14 S. E. 98 (1891).

Purpose of Section. — This section was enacted to eliminate a defect in the com-

mon-law rule and to extend it so as to make chattels real, such as growing trees, plants, minerals, metals and fences, connected in some way with the land, the subject of larceny. The obvious intent of the act was to prevent the willful and unlawful entry upon the land of another and the taking and carrying away of such articles as were not, at common law or by previous statute, the subject of larceny. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149 (1940).

Money Not Included.—The penalty for entering the lands of another and carrying off wood or any other kind of property whatsoever growing or being thereon, does not contemplate or embrace such taking and carrying away of money; it means such property as was not, at common law, subject to larceny. *State v. Vosburg*, 111 N. C. 718, 16 S. E. 392 (1892).

Turpentine which has flowed down trees into boxes made to catch it, and is in a state to be dipped out, is a subject of larceny. *State v. Moore*, 33 N. C. 70 (1850); *State v. King*, 98 N. C. 648, 4 S. E. 44 (1887).

Trespass upon land is an essential element of the offense hereby created. *State*

v. Jackson, 218 N. C. 373, 11 S. E. (2d) 149 (1940).

Claim of Interest Must Be Founded. — An entry, without a survey and grant from the State is not sufficient to support a claim to the land, and is no defense to an indictment under this section. *State v. Callo-way*, 119 N. C. 864, 26 S. E. 46 (1896).

Tombstones. — Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and chattels of a named person. The court instructed the jury that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of some value belonging to another, with felonious intent. Held: Neither the indictment nor the theory of trial refers to trespass constituting an element of the statutory crime of larceny of chattels real, nor to the distinction of taking with, and taking without felonious intent set forth in this section, and there is a fatal variance between the indictment for common-law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nonsuit should have been granted. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149 (1940).

§ 14-81. Larceny of horses and mules.—If any person shall steal any horse, mare, gelding or mule, he shall suffer imprisonment at hard labor for not less than one nor more than twenty years, at the discretion of the court. A count under this section may be joined in a bill of indictment with a count under § 14-82. (1866-7, c. 62; 1868, c. 37, s. 1; 1879, c. 234, s. 2; Code, s. 1066; Rev., s. 3505; 1917, c. 162, s. 2; C. S., s. 4260.)

Taking with Belief of Interest. — One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when he took the mule that he had an interest in it. *State v. Thompson*, 95 N. C. 596 (1886).

Same — Question for a Jury.—One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the question of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the mule he would be guilty of larceny was not error. *State v. Thompson*, 95 N. C. 596

(1886).

Joinder with Charge of Receiving Stolen Goods.—An indictment for horse stealing concluded at common law is punishable as petit larceny. If there are two counts and the second is for receiving stolen goods and concludes against the statute, the punishment for the two is the same and they may be joined, but on conviction a sentence of ten years is all that can be given. *State v. Lawrence*, 81 N. C. 522 (1879).

An indictment having two counts, one for horse stealing, the other for receiving stolen property, both concluding upon a statute, is defective as the offences are not of the same grade and a conviction is error. *State v. Johnson*, 75 N. C. 123 (1876).

§ 14-82. Taking horses or mules for temporary purposes.—If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a misdemeanor, and shall be

fined or imprisoned, or both fined and imprisoned, in the discretion of the court. (1879, c. 234, s. 1; Code, s. 1067; Rev., s. 3509; 1913, c. 11; C. S., s. 4261.)

Indictment.—An indictment for stealing the temporary use of a horse in violation of this section is not defective because it charges the stealing of the temporary use of a buggy also. *State v. Darden*, 117 N. C. 697, 23 S. E. 106 (1895).

Employee Liable.—An occasional employee, who took the employer's mule at night and drove it off without the knowl-

edge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. *Clark v. Whitehurst*, 171 N. C. 1, 86 S. E. 78 (1915).

§ 14-83: Repealed by Session Laws 1943, c. 543.

§ 14-84. **Larceny of taxed dogs misdemeanor.**—The larceny of any dog upon which the license tax provided in article two of the chapter entitled Dogs has been paid shall be a misdemeanor. (1919, c. 116, s. 9; C. S., s. 4263.)

Cross Reference.—See §§ 67-15 and 67-27.

§ 14-85. **Pursuing or injuring livestock with intent to steal.**—If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (1866, c. 57; Code, s. 1068; Rev., s. 3504; C. S., s. 4264.)

Sufficiency of Indictment.—An indictment under this section for injury to livestock, in which the animal alleged to have

been injured is described as a "certain cattle beast," is sufficiently definite. *State v. Credle*, 91 N. C. 640 (1884).

§ 14-86. **Destruction or taking of soft drink bottles.**—It shall be unlawful for any person, firm or corporation, or any employee thereof, to maliciously take up, carry away, destroy or in any way dispose of bottles or other property belonging to any bottler, bottling company, person, firm or corporation engaged in the business of bottling and/or distributing in bottles or other closed containers soda water, coca-cola, pepsi-cola, cheri-wine, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations commonly known as soft drinks. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 322, ss. 1, 2.)

Cross Reference.—As to pollution of soft drink bottles, see § 14-288.

ARTICLE 17.

Robbery.

§ 14-87. **Robbery with firearms or other dangerous weapons.**—Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years. (1929, c. 187, s. 1.)

The primary purpose and intent of the legislature in enacting this section, was to provide for more severe punishment for the commission of robbery when such of-

fense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. *State v. Jones*, 227 N. C. 402, 42 S. E. (2d) 465 (1947). See *State v. Chase*, 231 N. C. 589, 58 S. E. (2d) 364 (1950).

The main element of the offense is force or intimidation occasioned by the use or threatened use of firearms. *State v. Mull*, 224 N. C. 574, 31 S. E. (2d) 764 (1944).

Actual Possession of Firearms Necessary.—The purpose and intent of this section is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common-law robbery, and construing the title and context of the statute together to ascertain the legislative intent, it is held that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under this section, and it is reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon. *State v. Keller*, 214 N. C. 447, 199 S. E. 620 (1938).

It is not necessary to describe accurately or prove the particular identity or value of

the property, further than to show it was the property of the person assaulted or in his care, and had a value. *State v. Mull*, 224 N. C. 574, 31 S. E. (2d) 764 (1944).

An indictment for robbery with firearms will support a conviction of the lesser offenses of common-law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834 (1948). See §§ 15-169, 15-170, and notes.

Where an indictment charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, the two offenses having been committed at the same time, and evidence of guilt of one of the offenses being substantially the same as the evidence of guilt of the other, the acquittal or conviction for one offense will not bar a subsequent prosecution for the other. *State v. Dills*, 210 N. C. 178, 185 S. E. 677 (1936), distinguishing *State v. Clemmons*, 207 N. C. 276, 176 S. E. 760 (1934).

Evidence.—Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there is no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. *State v. Mull*, 224 N. C. 574, 31 S. E. (2d) 764 (1944).

Applied in *State v. Riddle*, 205 N. C. 591, 172 S. E. 400 (1934).

Cited in *State v. Murph*, 212 N. C. 494, 193 S. E. 709 (1937); *State v. Proctor*, 213 N. C. 221, 195 S. E. 816 (1938).

§ 14-88. Train robbery.—If any person shall enter upon any locomotive engine or car on any railroad in this State, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished by imprisonment in the State's prison for not less than ten years nor more than twenty years. (1895, c. 204, s. 2; Rev., s. 3765; C. S., s. 4266.)

§ 14-89. Attempted train robbery.—If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this State, by intimidation of those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the State's prison for not less than two years nor more than twenty years. (1895, c. 204, s. 1; Rev., s. 3766; C. S., s. 4267.)

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.—If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny. (21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; Code, s. 1014; 1889, c. 226; 1891, c. 188; 1897, c. 31; Rev., s. 3406; 1919, c. 97, s. 25; C. S., s. 4268; 1931, c. 158; 1939, c. 1; 1941, c. 31.)

Cross References. — As to larceny by servants or other employees, see § 14-74. As to the embezzlement of funds of a corporation by its officers, see § 14-254. As to embezzlement of funds of a bank by its officers, see § 53-129. As to embezzlement by a member of the State Sinking Fund Commission, see § 142-40. As to description in indictment for embezzlement, see § 15-150.

Editor's Note. — The 1931 amendment added "trustee" to the list of persons who may be guilty of embezzlement. Section 14-92 applies only to trustees of public bodies and institutions. The addition was probably necessary because of the fact that embezzlement is wholly a statutory crime. 9 N. C. Law Rev. 398.

The 1939 amendment inserted after the word "trustee" the words "or any receiver, or any other fiduciary", and was enacted to meet the decision in *State v. Whitehurst*, 212 N. C. 300, 193 S. E. 657, 113 A. L. R. 740 (1937). See 17 N. C. Law Rev. 348.

The 1941 amendment made this section applicable to bailees. For comment, see 19 N. C. Law Rev. 478.

The offense of embezzlement is exclusively statutory, and this section does not embrace a vendor in an executory contract of purchase and sale. *State v. Blair*, 227 N. C. 70, 40 S. E. (2d) 460 (1946).

Origin and Purpose.—Embezzlement was not a common-law offense. *State v. Hill*, 91 N. C. 561 (1884). It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed in them. 1

McLain Cr. Law, § 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use, could not be convicted of larceny on the ground that the money had never been in the employer's possession. *Clark's Cr. Law*, p. 308. *State v. McDonald*, 133 N. C. 680, 45 S. E. 582 (1903).

Compared with § 14-254.—The use of the word "abstract" in § 14-254 differentiates it from this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under § 14-254 to allege that the defendant is more than sixteen years old. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143 (1924).

Cannot Be Extended by Construction.—This section is a penal statute, creating a new offense, and cannot be extended by construction to persons not within the classes designated. *State v. Eurell*, 220 N. C. 519, 17 S. E. (2d) 669 (1941).

The fact that ch. 31, Public Laws 1941, amended this section, by adding "bailee" to the classes of persons specified constitutes a legislative declaration that theretofore a bailee was not included in the definition of classes of persons made by the statute. *State v. Eurell*, 220 N. C. 519, 17 S. E. (2d) 669 (1941).

The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. *State v. Cahoon*, 206 N. C. 388, 174 S. E. 91 (1934).

Fraudulent intent is a necessary element of the statutory offense of embezzlement and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. *State v. McLean*, 209 N. C. 38, 182 S. E. 700 (1935).

Meaning of Fraudulent Intent.—Fraudulent intent within the meaning of this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. *State v. McLean*, 209 N. C. 38, 182 S. E. 700 (1935); *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917 (1942).

Fraudulent intent which constitutes a necessary element of embezzlement, within the meaning of this section, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *State v. Gentry*, 228 N. C. 643, 46 S. E. (2d) 863 (1948).

Conversion Not Necessary.—To embezzle is for an agent fraudulently to misapply the property of his principal; it is not necessary that the agent should convert it to his own use, that is, expend the money for his own benefit. *State v. Foust*, 114 N. C. 842, 19 S. E. 276 (1894).

Necessity of Demand for Payment.—A demand is not necessary to support a prosecution under this section as it is not made a prerequisite to prosecution. *State v. Blackley*, 138 N. C. 620, 50 S. E. 310 (1905).

Property of Prosecutor.—The property alleged to have been embezzled must be the property of the prosecutor. *State v. Barton*, 125 N. C. 702, 34 S. E. 553 (1899).

Goods Received under Special Directions.—Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzles the same, he is indictable under this section. *State v. Costin*, 89 N. C. 511 (1883).

Intent to Repay No Defense.—An in-

tent to restore the property embezzled or a readiness and willingness at a latter date is not a defense to a prosecution under this section. *State v. Summers*, 141 N. C. 841, 53 S. E. 856 (1906).

To Whom Section Applies.—A contractor is not an officer, clerk or servant within the meaning of this section. *State v. Barton*, 125 N. C. 702, 34 S. E. 553 (1899). Nor is the relation of lessor and lessee embraced by the statute. *State v. Keith*, 126 N. C. 1114, 36 S. E. 169 (1900). And it does not apply to clerks of the superior courts and like officers who would seem to fall within the terms of § 14-92. *State v. Connelly*, 104 N. C. 794, 10 S. E. 469 (1889).

Commissioner in Equity Cannot Be Convicted as Agent or Attorney.—A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz.: to sell the land and distribute the proceeds to the parties entitled thereto; immediately upon his appointment he ceases to be an attorney or agent for either party, and where the indictment charges the defendant with embezzlement of funds under this section as commissioner the defendant could not be convicted as agent or attorney. *State v. Ray*, 207 N. C. 642, 178 S. E. 224 (1935).

Allegations and Proof.—The name of the person from whom the money was received need not be stated. *State v. Lanier*, 88 N. C. 658 (1883); *State v. Lanier*, 89 N. C. 517 (1883).

And it need not be alleged or proved that the property charged to have been embezzled had been committed to the care of defendant, nor that any breach of confidence or trust, save that which grows out of the relation of owner and servant or agent, had occurred. *State v. Wilson*, 101 N. C. 730, 7 S. E. 872 (1888).

The averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute. *State v. Lanier*, 88 N. C. 658 (1883); *State v. Lanier*, 89 N. C. 517 (1883).

The crime of embezzlement rests upon statute alone and conviction thereof under an indictment drawn under this section, when the evidence tends only to show a violation of § 14-92, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. *State v. Grace*, 196 N. C. 280, 145 S. E. 399 (1928).

Evidence—Intent Must Be Shown.—The conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud.

State v. McDonald, 133 N. C. 680, 45 S. E. 582 (1903). But the burden of showing that he is under age is on the defendant and the State is not called on to prove that he is past sixteen years old, for this is a matter of defence and within the defendant's knowledge. *State v. Blackley*, 138 N. C. 620, 50 S. E. 310 (1905).

It is not necessary that a warrant for embezzlement issued by a justice of the peace should describe the criminal offense with the legal accuracy required in an indictment. *Durham v. Jones*, 119 N. C. 262, 25 S. E. 873 (1896).

Where there is evidence that an agent is charged with the duty of selling a load of tobacco upon a local market on behalf of the principal only, and accordingly receiving the price, he intentionally and wrongfully converted it to his use, it is sufficient to constitute the crime of embezzlement under this section and to sustain a verdict of guilty. *State v. Eubanks*, 194 N. C. 319, 139 S. E. 451 (1927).

Evidence Sufficient to Go to Jury.—The evidence tended to show that prosecuting witness requested defendant to refinance a chattel mortgage on the witness' automobile, that defendant agreed to do so for a fee, that defendant obtained cash from a finance company on a second chattel mortgage and notes executed by the witness or purported to have been executed by him, and advised the witness that he had sent the money to pay off the prior mortgage, that the prior mortgage was not paid, and that defendant refused to reimburse the witness. It was held that the evidence was sufficient to be submitted to the jury on the charge of embezzlement by defendant of funds received by him as agent of the prosecuting witness. *State v. Gentry*, 228 N. C. 643, 46 S. E. (2d) 863 (1948).

§ 14-91. Embezzlement of State property by public officers and employees.—If any officer, agent or employee of the State, or other person having or holding in trust for the same any bonds issued by the State, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of a felony, and shall be fined not less than ten thousand dollars, or imprisoned in the State's prison not less than twenty years, or both, at the discretion of the court. (1874-5, c. 52; Code, s. 1015; Rev., s. 3407; C. S., s. 4269.)

The word "property" is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. *State v. Ward*, 222 N. C. 316, 22 S. E. (2d) 922 (1942).

The fraudulent intent which constitutes a necessary element of the crime of em-

Accusation of Embezzlement Actionable Per Se in Slander.—The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710 (1925).

It is unnecessary to determine whether an indictment could be sustained under other of the cognate statutes, §§ 14-91 through 14-99, where an indictment of a bank receiver for embezzlement is drawn under this section. *State v. Whitehurst*, 212 N. C. 300, 193 S. E. 657, 113 A. L. R. 740 (1937).

Illustrations of Wrongful Misapplications.—By a treasurer of a society depositing money in his private bank. See *State v. Dunn*, 138 N. C. 672, 50 S. E. 772 (1905). By a sales agent for automobiles. See *State v. Klingman*, 172 N. C. 947, 90 S. E. 690 (1916). By an agent selling a load of tobacco. See *State v. Eubanks*, 194 N. C. 319, 139 S. E. 451 (1927).

By an agent to buy a lot and build house. See *State v. McClure*, 205 N. C. 11, 169 S. E. 809 (1933). By a consignee and agent of a piano company. See *State v. Dula*, 206 N. C. 745, 175 S. E. 80 (1934).

Stated in *In re Hege*, 205 N. C. 625, 172 S. E. 345 (1934).

Cited in *State v. Hill*, 91 N. C. 561 (1884); *State v. Harper*, 94 N. C. 936 (1886); *State v. Dunn*, 134 N. C. 663, 46 S. E. 949 (1904); *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (1906); *Beck v. Bank*, 161 N. C. 201, 76 S. E. 722 (1912); *State v. Wadford*, 194 N. C. 336, 139 S. E. 608 (1927); *State v. Harwood*, 206 N. C. 87, 173 S. E. 24 (1934); *State v. Shore*, 206 N. C. 743, 175 S. E. 116 (1934).

bezzlement, within this section, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917 (1942).

Instructions.—Where, in a prosecution for embezzlement, under this and the preceding section, counsel for defendant, in argument to the jury, commented on the severity of the minimum punishment in this section, and the court in its charge read the section to the jury and the indictment thereunder and also a portion of the general probation statute, carefully cautioning them that they were to decide

the issue upon the evidence without regard to the punishment which might or might not be imposed, the charge was proper and not prejudicial. *State v. Ward*, 222 N. C. 316, 22 S. E. (2d) 922 (1942). See also, *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917 (1942).

Cited in *State v. Hill*, 91 N. C. 561 (1884); *State v. Connelly*, 104 N. C. 794, 10 S. E. 469 (1889).

§ 14-92. Embezzlement of funds by public officers and trustees.—

If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, and shall be fined and imprisoned in the State's prison in the discretion of the court. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the State shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the State's prison or county jail, or fine in the discretion of the court. (1876-7, c. 47; Code, s. 1016; 1891, c. 241; Rev., s. 3408; C. S., s. 4270.)

Compared with § 14-231.—Under § 14-231 failure by an officer to pay over money coming into his hands is a misdemeanor. That section is very broad and seems to cover every case of failure by an officer to pay to the proper person funds coming into his hands. By this section the offence is declared a felony. An officer indicted for failure to pay to proper persons funds coming into his hands should be allowed the privilege of having the facts submitted to the jury. *State v. Windley*, 178 N. C. 670, 100 S. E. 116 (1919).

Meaning of "Willfully and Corruptly."—In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition that "willfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were

held" is not erroneous under the circumstances of this case. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657 (1932).

Applies Only to Public Funds.—This section does not embrace the unlawful appropriation of the property of private individuals. *State v. Connelly*, 104 N. C. 794, 10 S. E. 469 (1889).

Clerks of Courts.—In the case of *State v. Connelly*, 104 N. C. 794, 10 S. E. 469 (1889), it was held that this section was not applicable to clerks of the superior courts but by an amendment at the next session of the legislature it was expressly made applicable to clerks of superior courts. *State v. Windley*, 178 N. C. 670, 100 S. E. 116 (1919).

Cited in *State v. Hill*, 91 N. C. 561 (1884); *New York Indemnity Co. v. Corporation Commission*, 197 N. C. 562, 150 S. E. 16 (1929).

§ 14-93. Embezzlement by treasurers of charitable and religious organizations.—

If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if

he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (1879, c. 105; Code, s. 1017; Rev., s. 3409; C. S., s. 4271.)

Two Offenses Created.—Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending their moneys without consent; the other is the failure to account for such moneys. *State v. Dunn*, 138 N. C. 672, 50 S. E. 772 (1905).

Association for Members Solely.—An

association organized for the benefit of its members solely is not a benevolent or religious association and an indictment under this section cannot be sustained against an officer who misappropriates funds of the association. *State v. Dunn*, 134 N. C. 663, 46 S. E. 949 (1904).

Cited in *State v. Hill*, 91 N. C. 561 (1884).

§ 14-94. Embezzlement by officers of railroad companies.—If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the State's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (1870-1, c. 103, s. 1; Code, s. 1018; Rev., s. 3403; C. S., s. 4272.)

§ 14-95. Conspiring with officers of railroad companies to embezzle.—If any person shall agree, combine, collude or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in § 14-94, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the State's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars. (1870-1, c. 103, s. 2; Code, s. 1019; Rev., s. 3404; C. S., s. 4273.)

Cited in *State v. Hill*, 91 N. C. 561 (1884); *State v. Lewis*, 142 N. C. 626, 633, 55 S. E. 600 (1906).

§ 14-96. Embezzlement by insurance agents and brokers.—If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order or society, lawfully doing business in this State, embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny. (1889, c. 54, s. 103; Rev., s. 3489; 1911, c. 196, s. 8; C. S., s. 4274.)

§ 14-96.1. Report to Commissioner. — Whenever any insurance company, its manager, general agent or other representative knows or has reasonable cause to believe that any agent, broker or other representative of such company is guilty under the preceding section, it shall be the duty of such company, its manager, general agent or other representative, within thirty days after ac-

quiring such knowledge to file with the Commissioner a complete statement of all the relevant facts and circumstances. All such reports shall be privileged communications, and when filed in good faith shall in nowise subject the company or individuals making the same to any liability whatsoever. The Commissioner may suspend the license to do business in this State of any insurance company, its general manager, agent or other representative who willfully fails to comply with this section. (1945, c. 382.)

§ 14-97. Appropriation of partnership funds by partner to personal use.—Any person engaged in a partnership business in the State of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his copartners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor. (1921, c. 127; C. S., s. 4274(a).)

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as

the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. *State v. Rawls*, 202 N. C. 397, 162 S. E. 899 (1932).

§ 14-98. Embezzlement by surviving partner.—If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the State's prison in the discretion of the court. (1901, c. 640, s. 9; Rev., s. 3405; C. S., s. 4275.)

§ 14-99. Embezzlement of taxes by officers.—If any officer appropriates to his own use the State, county, school, city or town taxes, he shall be guilty of embezzlement, and may be punished by confinement in the State's prison not exceeding five years, at the discretion of the court. (1883, c. 136, s. 49; Code, s. 3705; Rev., s. 3410; C. S., s. 4276.)

Whether Felony or Misdemeanor.—As this section is silent as to whether or not the offence set out is a felony or a misdemeanor it will be construed as a misdemeanor as an offence will never be made a felony by construction of any doubtful or ambiguous words in the statute. *State v. Hill*, 91 N. C. 561 (1884). But see § 14-1.

Inference of Fraudulent Intent.—While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be

inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. *State v. Lancaster*, 202 N. C. 204, 162 S. E. 367 (1932).

Cited in *State v. Connelly*, 104 N. C. 794, 10 S. E. 469 (1889).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false tokens and other false pretenses.—If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the State any money, goods, property or other thing of value, or any bank note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this State or any of the United States, or any treasury warrant, debenture, certificate of stock or public security, or any

order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and shall be imprisoned in the State's prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on the trial of any one indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. (33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1; 1811, c. 814, s. 2, P. R.; R. C., c. 34, s. 67; Code, s. 1025; Rev., s. 3432; C. S., s. 4277.)

Cross Reference.—As to alleging intent in the indictment, see § 15-151.

Origin of Section.—This section was derived from the English statutes, 33 Hen. VIII, and 30 George II. *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927).

Elements of the Crime.—To constitute the crime of false pretense, a mistake, a pretense, a false pretense, a mere promise or opinion is not sufficient. It must be a (1) false representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive, and (3) which does in fact deceive (4) by which one man obtains value from another without compensation. *State v. Simpson*, 10 N. C. 620 (1825); *State v. Roberts*, 189 N. C. 93, 126 S. E. 161 (1925), cited in *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927); *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705 (1941); *State v. Davenport*, 227 N. C. 475, 492, 42 S. E. (2d) 686 (1947).

The constituent elements of the offense of false pretense are: (1) That the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. *State v. Carlson*, 171 N. C. 818, 89 S. E. 30 (1916); *State v. Johnson*, 195 N. C. 506, 142 S. E. 775 (1928).

Same—Subsisting Fact.—It is settled that a promise is not a pretense. No matter what the form, or however false the promise to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact. *State v. Phifer*, 65 N. C. 321 (1871);

State v. Knott, 124 N. C. 814, 32 S. E. 798 (1899).

Same—Whether in Writing or Words.

—It was held formerly that some false writing or token was necessary to constitute the offense. See *State v. Simpson*, 10 N. C. 620 (1825). This case was overruled in *State v. Phifer*, 65 N. C. 321 (1871), where it is held that a naked lie meeting the other requirements enumerated in the preceding paragraph is a crime within the meaning of the section. This latter case is followed in *State v. Dixon*, 101 N. C. 741, 7 S. E. 870 (1888). In fact the false pretense may be by act or conduct without spoken words. See *State v. Matthews*, 121 N. C. 604, 28 S. E. 469 (1897).

Same—Intent to Deceive.—The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. *State v. Blue*, 84 N. C. 807 (1881); *State v. Oakley*, 103 N. C. 408, 9 S. E. 575 (1889). In the absence of such definite finding, the uniform practice is to grant a new trial. *State v. McCloud*, 151 N. C. 730, 66 S. E. 568 (1909).

Same—Actual Deceit.—Another of the elements is that the party to whom the false representation was made was deceived by it. *State v. Whedbee*, 152 N. C. 770, 67 S. E. 60 (1910). If he is so deceived it matters not whether he parted with goods for the sake of gain or for a charitable purpose. *State v. Matthews*, 91 N. C. 635 (1884).

Caveat Emptor.—The doctrine of caveat emptor "let the buyer beware" does not apply to actual fraud or obtaining property by false representation. By this doctrine the purchaser is forewarned of tricks of the trade, bluster, puffs and empty boasts on the part of the person putting his property on the market; but the seller can not es-

cape the penalty by reason of the doctrine where the facts constituting the crime, as stated in the second paragraph of this note, are made to appear. See *State v. Jones*, 70 N. C. 75 (1874); *State v. Young*, 76 N. C. 258 (1877); *State v. Burke*, 108 N. C. 750, 12 S. E. 1000 (1891).

False Representations as to Deed of Trust.—A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money is a false pretense within this section. *State v. Roberts*, 189 N. C. 93, 126 S. E. 161 (1925).

False Representation as to Title to Land.—One who obtains money as the purchase price of land sold by him to another upon the representation that the land is unencumbered when it is encumbered by a mortgage, is liable in a prosecution for obtaining goods under false pretenses. *State v. Munday*, 78 N. C. 460 (1878).

False Representations as to Standing Timber.—A conviction under this section for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. *State v. Corey*, 199 N. C. 209, 153 S. E. 923 (1930).

Passing Counterfeit Money.—Where a person buys goods from another and the change given back by the seller is counterfeit an indictment under this section cannot be had, for there has been no fraudulent representations, nor intent to defraud before the defendant received the money. *State v. Allred*, 84 N. C. 749 (1881).

Representation to Agent of Owner of Goods.—It is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent. *State v. Taylor*, 131 N. C. 711, 42 S. E. 539 (1902).

Corporations Liable.—“In *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58 (1910), it is said: ‘The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. *State v.*

Shaw, 92 N. C. 768 (1885). This is fully sustained by all the late authorities.’” *State v. Salisbury Ice, etc., Co.*, 166 N. C. 366, 81 S. E. 737 (1914).

The Indictment.—The indictment must allege all of the essential elements of the offense. *State v. Claudius*, 164 N. C. 521, 80 S. E. 261 (1913).

The indictment must show a causal connection between the false representation and the parting with the property (*State v. Whedbee*, 152 N. C. 770, 67 S. E. 60 (1910)) but no particular form of words is necessary; an allegation that “by means of the false pretense” or “relying on the false pretense,” or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged. *State v. Claudius*, 164 N. C. 521, 80 S. E. 261 (1913).

The charge as to the persons intended to be cheated is surplusage and immaterial, all that is necessary is a charge of intent. *State v. Ridge*, 125 N. C. 653, 31 S. E. 439 (1899); *State v. Salisbury Ice, etc., Co.*, 166 N. C. 366, 81 S. E. 737 (1914).

An indictment for false pretense charging that defendant wilfully, knowingly, falsely and feloniously pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in truth and in fact he had not cut the same, and by means of said false pretense did obtain from the prosecutor three dollars in money, with intent, etc., is sufficient. *State v. Eason*, 86 N. C. 674 (1882).

Indictment held sufficient. *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705 (1941); *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686 (1947).

Necessity of Averring Property Obtained.—The indictment must describe the thing alleged to have been thereby obtained with reasonable certainty, and by the name or term usually employed to describe it; and where the indictment charges obtaining money by a false pretense, and the State’s evidence tends only to show that the defendant had obtained the signature of the prosecutor as an indorser or surety to a negotiable instrument, there is a fatal variance between the charge and the proof, and defendant’s motion to nonsuit should be sustained. *State v. Gibson*, 169 N. C. 318, 85 S. E. 7 (1915). No averment of the value of the property obtained is necessary. *State v. Gillespie*, 80 N. C. 396 (1879). And where the allegation is that money was obtained and the proof is that property was obtained but the defendant made no exception, there is no ground for

reversal. *State v. Ashford*, 120 N. C. 588, 26 S. E. 915 (1897). Nonsuit is the proper method of raising the question of variance. *State v. Gibson*, *supra*.

The offense is a felony and a bill of indictment charging such offense and which omits the word "feloniously" is defective, and judgment will be arrested on a verdict of guilty. *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010 (1893).

Evidence held insufficient to sustain conviction in prosecution under this section.

§ 14-101. Obtaining signatures by false pretenses.—If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the State's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court. (1871-2, c. 92; Code, s. 1026; Rev., s. 3433; C. S., s. 4278; 1945, c. 635.)

Cross References.—See annotations under § 14-100. As to forgery, see § 14-119 et seq. As to uttering a false bill of lading, see § 21-42.

Editor's Note. — Prior to the 1945 amendment this section also applied to obtaining property by false pretenses.

Offense Is a Felony.—This section provides for imprisonment in the penitentiary, and therefore since the enactment of § 14-1 all offences under this section are felonies, and an indictment must charge "feloniously." *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010 (1893), overruling *State v. Crumples*, 90 N. C. 701 (1884) in which it was held that as this section did not specify that the offence was a felony it would be treated as a misdemeanor in spite of the punishment being as for felonies.

Signing or Endorsing Note. — It has been held in *State v. Gibson*, 169 N. C. 318, 85 S. E. 7 (1915), that it is an indictable offense under this section, to procure a person to sign or endorse a note by means of false representation and with in-

State v. Yancey, 228 N. C. 313, 45 S. E. (2d) 348 (1947).

Applied in *State v. Hollingsworth*, 206 N. C. 739, 175 S. E. 99 (1934); *State v. Stansbury*, 230 N. C. 589, 55 S. E. (2d) 185 (1949).

Cited in *State v. Jones*, 65 N. C. 395 (1871); *State v. Howard*, 129 N. C. 584, 40 S. E. 71 (1901); *Factor v. Laubenheimer*, 290 U. S. 276, 54 S. Ct. 191, 78 L. Ed. 151 (1933).

tent to cheat and defraud. *State v. Johnson*, 195 N. C. 506, 142 S. E. 775 (1928).

Same—Element of Intent.—In order to constitute false pretense in procuring endorsement of a note upon misrepresentation by the maker to one of the endorsers that he had secured certain endorsers with him, when, in fact he had used the note without other endorsers, evidence that the maker had turned over to the endorsers on the note his entire stock of merchandise and that he had thereupon had a civil judgment in their favor canceled of record, is material and competent upon the element of intent necessary to constitute the offense charged. *State v. Johnson*, 195 N. C. 506, 142 S. E. 775 (1928).

Indictment Must Allege Certain Offense.—An indictment should state with reasonable certainty the offence charged, and an indictment charging the defendant with obtaining money when he obtained a note, is defective. *State v. Gibson*, 169 N. C. 318, 85 S. E. 7 (1915).

§ 14-102. Obtaining property by false representation of pedigree of animals.—If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars nor more than three hundred dollars, or by imprisonment for a term not exceeding six months. (1891, c. 94, s. 2; Rev., s. 3307; C. S., s. 4279.)

§ 14-103. Obtaining certificate of registration of animals by false representation.—If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or com-

pany for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars, or by both such fine and imprisonment. (1891, c. 94, s. 1; Rev., s. 3308; C. S., s. 4280.)

§ 14-104. Obtaining advances under promise to work and pay for same.—If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1889, c. 444; 1891, c. 106; 1905, c. 411; Rev., s. 3431; C. S., s. 4281.)

Cross Reference.—As to tenant or crop-per willfully abandoning landlord after advances have been made, see § 14-358.

Editor's Note.—The 1905 amendment, which made failure to perform services after being paid therefor presumptive evidence of fraudulent intent, has been held to contravene the Constitution both of North Carolina and of the United States. *State v. Griffin*, 154 N. C. 611, 70 S. E. 292 (1911). A similar provision in an Alabama statute was held to be unconstitutional in *Bailey v. Alabama*, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

Constitutional.—The gist of the offense of procuring advances "with intent to cheat and defraud" is not the obtaining the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. This section is constitutional. *State v. Norman*, 110 N. C. 484, 14 S. E. 968 (1892), decided before the 1905 amendment discussed above.

Intent Must Be Shown.—To convict under this section it is necessary to show

the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. *State v. Griffin*, 154 N. C. 611, 70 S. E. 292 (1911); *State v. Islay*, 164 N. C. 491, 79 S. E. 1105 (1913).

And Must Be Alleged in Warrant.—A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advance was obtained with intent to cheat or defraud, is fatally defective. *State v. Phillips*, 228 N. C. 446, 45 S. E. (2d) 535 (1947).

No Day of Grace.—Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday: Held, to be a failure to begin work within the meaning of the statute. *State v. Norman*, 110 N. C. 484, 14 S. E. 968 (1892).

§ 14-105. Obtaining advances under written promise to pay therefor out of designated property.—If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. (1879, cc. 185, 186; Code, s. 1027; 1905, c. 104; Rev., s. 3434; C. S., s. 4282.)

Constitutional.—It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its pay-

ment, and advances made on the faith of such pledge; on this ground it is declared constitutional. *State v. Torrence*, 127 N. C. 550, 37 S. E. 268 (1900); *State v. Mooney*, 173 N. C. 798, 92 S. E. 610 (1917).

Representations Must Be of Existing Facts.—An indictment for obtaining goods under a false pretense, must be founded on a false representation by the defendant of an existing fact, and the pledging of a check to be received at a subsequent date does not come within the meaning of the section. *State v. Whidbee*, 124 N. C. 796, 32 S. E. 318 (1899).

Indictment Should Charge Exact Terms.—The indictment should charge in the exact terms of the statute, and on failure to follow the statute it is subject to being

quashed. *State v. Mooney*, 173 N. C. 798, 92 S. E. 610 (1917).

Compared with § 14-114.—This section is on the same footing as § 14-114 for disposing of mortgaged property. It is not the failure to pay the debt which is made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus pro tanto become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. *State v. Mooney*, 173 N. C. 798, 92 S. E. 610 (1917).

§ 14-106. Obtaining property in return for worthless check, draft or order.—Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud. (1907, c. 975; 1909, c. 647; C. S., s. 4283.)

Local Modification.—New Hanover: Pub. Loc. 1927, c. 636.

Cross Reference.—As to false warehouse receipts, see § 27-54 et seq.

It is a misdemeanor for any person knowingly to utter a worthless check in this State and such act involves moral turpitude under this section if done with intent to defraud. *Oats v. Wachovia Bank, etc., Co.*, 205 N. C. 14, 169 S. E. 869 (1933).

Intent to Cheat or Defraud.—In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. *State v. Horton*, 199 N. C. 771, 155 S. E. 866 (1930).

Signing in Name of Company.—Upon the trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflicting as to whether the defendant was a member of the concern. It was held, that the question as to whether

the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was reversible error. *State v. Anderson*, 194 N. C. 377, 139 S. E. 701 (1927).

Same—Burden of Proof.—The burden of proving the guilt of defendant in violating this section, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. *State v. Anderson*, 194 N. C. 377, 139 S. E. 701 (1927).

Cited in *Melton v. Rickman*, 225 N. C. 700, 36 S. E. (2d) 276, 162 A. L. R. 793 (1945).

§ 14-107. Worthless checks.—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient

funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor. [If the amount due on such check is not over fifty dollars, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days.]

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft. The part of this section in brackets shall only apply to the counties of Alamance, Alleghany, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Buncombe, Burke, Cabarrus, Caldwell, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Clay, Columbus, Cumberland, Currituck, Davidson, Davie, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, Macon, Madison, Martin, Mecklenburg, Mitchell, Moore, Nash, Northampton, Onslow, Orange, Pamlico, Pitt, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Union, Vance, Wake, Washington, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356.)

Local Modification.—For an act amending an act that was never passed by the legislature, and applying only to Durham County, see Public Laws 1931, c. 292.

Cross Reference.—See annotation to § 14-106.

Editor's Note.—The part of this section appearing in brackets in the third paragraph, and some of the counties to which applicable, were added by the 1929 amendment. The 1931, 1933 and 1939 amendments added other counties. The first 1949 amendment added Jones County and the second 1949 amendment added Beaufort County. The 1951 amendment inserted the second paragraph.

As pointed out in the article in 3 N. C. Law Rev. 141, the giving of worthless checks was first regulated in this State by the Acts of 1907 and 1909. Those acts are partly quoted and the elements of the crime analysed in the article. It was pointed out that although not expressly stated a logical interpretation discloses that under those acts the checks must have been given for present value and it was held that the freight for a carload of lumber was a present value within the section. (See *State v. Freeman*, 172 N. C. 925, 90 S. E. 507 (1916).)

In 1925 the legislature passed a new bad

check law which left out the element of intent to defraud, etc., so that under it the giving of a check with insufficient funds was a crime. The elements of the crime under that law are outlined in *State v. Edwards*, 190 N. C. 322, 130 S. E. 10 (1925), and repeated in the Law Review article. It was also pointed out that the indictment must have charged both "insufficient funds" and "insufficient credits" to charge a violation. The question of the constitutionality of this act was raised both in the article previously cited and in 5 N. C. Law Rev. 75, where the position was taken that the law was violative of the Constitution, Art. I, § 16, as permitting the imprisonment for debt.

Subsequently the legislature at the 1927 session repealed the act and passed the present section which cures the defect pointed out in the Law Review, and it has been upheld by the Supreme Court. See *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927).

It would seem that this section does not require that the check be given for present value. The essence of the crime seems to be the giving of a check for the payment of money or its equivalent knowing that there are insufficient funds or credit with which to pay upon presentment whether

for a pre-existing debt or for present value. See *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927).

For a general note on the subject, see 14 Va. Law Rev. 134; as to applicability of the Virginia statute to postdated checks, see 14 Va. Law Rev. 145.

Public Detriment.—The gravamen of the offense proscribed by this section is the putting into circulation worthless commercial paper to the public detriment, and not that of the individual payee. *State v. Levy*, 220 N. C. 812, 18 S. E. (2d) 355 (1942).

Postdated Check. — A postdated check given for a past-due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. *State v. Crawford*, 198 N. C. 522, 152 S. E. 504 (1930).

Indictment—Necessity of Charging All Elements.—In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. *State v. Edwards*, 190 N. C. 322, 130 S. E. 10 (1925).

Issuance as Fraud.—The issuance of a check on a bank in violation of this law is a false representation of subsisting facts that the maker has on deposit sufficient funds for its payment at the bank, upon its presentation, or that he has made the necessary arrangements with the bank therefor and is in effect a fraud upon the payee, the payee accepting it in good faith. *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927) (dis. op.).

It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. *State v. White*, 230 N. C. 513, 53 S. E. (2d) 436 (1949).

Fatal Variance in Allegata and Probata.—An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in viola-

tion of our statute, and evidence that it was given for the hire of an automobile, ten days later, are at fatal variance, and will not support a conviction. *State v. Corpening*, 191 N. C. 751, 133 S. E. 14 (1926).

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. *State v. Dowless*, 217 N. C. 589, 9 S. E. (2d) 18 (1940).

Waiver of Right to Trial by Jury. — Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. 1, § 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. *State v. Crawford*, 197 N. C. 513, 149 S. E. 729 (1929).

Instruction held proper. *State v. Levy*, 220 N. C. 812, 18 S. E. (2d) 355 (1942).

Sentence.—Upon defendant's conviction upon two warrants charging the issuance of worthless checks, a sentence of two years' imprisonment on the first warrant and one year's imprisonment on the second, the sentences to run consecutively, cannot be held excessive, cruel or unusual, since the sentences were within the limits prescribed by this section. *State v. Levy*, 220 N. C. 812, 18 S. E. (2d) 355 (1942).

A sentence to 18 months' labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. *State v. White*, 230 N. C. 513, 53 S. E. (2d) 436 (1949).

Cited in *State v. Byrd*, 204 N. C. 162, 167 S. E. 626 (1933); *Oates v. Wachovia Bank, etc., Co.*, 205 N. C. 14, 169 S. E. 869 (1933).

§ 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.—Any person who shall operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with

the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee, of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 1.)

§ 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.—Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor, punishable by a fine or imprisonment, or in the discretion of the court, by both. (1927, c. 68, s. 2.)

§ 14-110. Obtaining entertainment at hotels and boardinghouses without paying therefor.—Any person who obtains any lodging, food or accommodation at an inn, boardinghouse or lodginghouse without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn, boardinghouse or lodginghouse by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, boardinghouse or lodginghouse, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation or lodging, shall be guilty of a misdemeanor, and shall upon conviction be fined or imprisoned at the discretion of the court. (1907, c. 816; C. S., s. 4284.)

Local Modification.—Pitt: 1929, c. 103; Martin, Wake, Watauga: 1931, c. 9; Buncombe, Jackson, Franklin: 1933, c. 531; Lee: 1937, c. 168; Rockingham: 1939, c. 53.

Cross Reference.—As to liens on baggage, see § 44-30 et seq.

Constitutionality. — The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhibited by Article I, § 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753 (1924).

Boardinghouse Defined. — One who has

not been licensed to keep a boardinghouse, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boardinghouse. *State v. McRae*, 170 N. C. 712, 86 S. E. 1039 (1915).

Evidence Insufficient for Conviction.—In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boardinghouse, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boardinghouse to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his

wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753 (1924).

Evidence Sufficient to Convict.—Where

there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. *State v. Hill*, 166 N. C. 298, 81 S. E. 408 (1914).

§ 14-111. Fraudulently obtaining credit at hospitals and sanatoriums.—Any person who obtains accommodation at any public or private hospital or sanatorium without paying therefor, with intent to defraud the said hospital or sanatorium, or who obtains credit at such hospital or sanatorium by the use of any false pretense, or who, after obtaining credit or accommodation at a hospital or sanatorium, absconds and surreptitiously removes his baggage therefrom without paying for the accommodation or credit, shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned at the discretion of the court. (1931, c. 214.)

§ 14-112. Obtaining merchandise on approval.—If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of merchandise on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor. Evidence that a person has solicited a merchant to deliver to him any article of merchandise for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section: Provided, this section shall not apply to merchandise sold upon a written contract which is signed by the purchaser. (1911, c. 185; C. S., s. 4285; 1941, c. 242.)

Editor's Note. — The 1941 amendment substituted the word "merchandise" for the words "wearing apparel" formerly appear-

ing in this section. It also added the proviso at the end of the section.

§ 14-113. Obtaining money by false representation of physical defect.—It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor. (1919, c. 104; C. S., s. 4286.)

Cross References.—As to regulation of beggars, see § 108-81 et seq. As to fraudulently obtaining old age assistance, see § 108-42. As to defrauding the North Car-

olina governmental employees' retirement system for counties, cities, and towns, see § 128-32.

ARTICLE 20.

Frauds.

§ 14-114. Fraudulent disposal of mortgaged personal property.—If any person, after executing a chattel mortgage, deed of trust or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed of trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or

abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. In all indictments for violations of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such chattel mortgage, deed of trust or lien, by the grantor thereof, after the execution of said chattel mortgage, deed of trust, or lien, and while it is in force, the further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for his seizure, for the satisfaction of such chattel mortgage, deed of trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed of trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be prima facie proof of the fact of the disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed of trust or lien was made. (1873-4, c. 31; 1874-5, c. 215; 1883, c. 61; Code, s. 1089; 1887, c. 14; Rev., s. 3435; C. S., s. 4287.)

Cross Reference.—As to fraudulent conveyances, see § 39-15 et seq.

Three Classes of Offenders.—The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts. *State v. Woods*, 104 N. C. 898, 10 S. E. 555 (1889).

Intent Necessary.—Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the legislature. *State v. Manning*, 107 N. C. 910, 12 S. E. 248 (1890). The actual sale of mortgaged crops raises a presumption of fraudulent intent. *State v. Holmes*, 120 N. C. 573, 26 S. E. 692 (1897). In a trial under this section the burden is upon the defendant to disprove the criminal intent. *State v. Surles*, 117 N. C. 720, 23 S. E. 324 (1895); *State v. Holmes*, 120 N. C. 573, 26 S. E. 692 (1897).

Result of Sale Must Injure.—If the property included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudicial result as is contemplated by the statute. *State v. Manning*, 107 N. C. 910, 12 S. E. 248 (1890).

Justice Jurisdiction.—Under the original acts justices of the peace have exclusive jurisdiction of the offense of fraudulently disposing of personal property embraced in a chattel mortgage. *State v. Jones*, 83 N. C. 657 (1880).

Infant's Liability.—An indictment un-

der this section for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. *State v. Howard*, 88 N. C. 651 (1883).

Indictment Must Charge Maker, Buyer or Assistant.—If the indictment does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property no offense is charged. *State v. Woods*, 104 N. C. 898, 10 S. E. 555 (1889).

Indictment Must Charge Lien and Manner of Sale.—An indictment for disposing of mortgaged property is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition. *State v. Pickens*, 79 N. C. 652 (1878); *State v. Burns*, 80 N. C. 376 (1879).

Indictment in Two Counts.—Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed. *State v. Surles*, 117 N. C. 720, 23 S. E. 324 (1895).

Prior Lien as Defense.—It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property—a crop of tobacco—to show that he, in good faith, applied the entire crop to the

discharge of his landlord's lien. *State v. Ellington*, 98 N. C. 749, 4 S. E. 534 (1887).

Evidence of Other Sales Inadmissible.—On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to

dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed. *State v. Jeffries*, 117 N. C. 727, 23 S. E. 163 (1895).

Cited in *State v. Torrence*, 127 N. C. 550, 37 S. E. 268 (1900); *State v. Barrett*, 138 N. C. 630, 50 S. E. 506 (1905).

§ 14-115. Secreting property to hinder enforcement of lien.—Any person removing, exchanging or secreting any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor. (1887, c. 14; Rev., s. 3436; C. S., s. 4288.)

Local Modification.—Pitt: 1941, c. 284.

§ 14-116. Fraudulent entry of horses at fairs.—If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this State, any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by a fine not less than one hundred nor more than one thousand dollars, or by imprisonment in the State's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court. (1893, c. 387; Rev., s. 3429; C. S., s. 4289.)

§ 14-117. Fraudulent and deceptive advertising.—It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1915, c. 218; C. S., s. 4290.)

Cross References.—As to the use of private marks or labels to defraud, see § 80-12. As to the misbranding of sacks, see

§ 80-14.

Cited in *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850 (1942).

§ 14-117.1. Use of words "army" or "navy" in name of mercantile establishment.—It shall be unlawful for any person, firm, or corporation, to use the words "army" or "navy" or either, or both, in the name or as a part of the name of any mercantile establishment in this State which is not in fact operated by the United States government or a duly authorized agency thereof.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00) for the first offense, and not less than fifty dollars (\$50.00) nor more

than one thousand dollars (\$1,000.00) for each subsequent such offense. (1945, c. 879.)

Local Modification.—Beaufort: 1949, c. 857.

§ 14-118. **Blackmailing.**—If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the State's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor. (R. C., c. 34, s. 110; Code, s. 989; Rev., s. 3428; C. S., s. 4291.)

Indictment.—Where the offense charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication that the defendant threatened to indict the prosecutor for an offense punishable by imprisonment in the penitentiary, with a view and intent to extort money a criminal offense is sufficiently charged. *State v. Harper*, 94 N. C. 936 (1886).

Circumstantial Evidence.—Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain sig-

nal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. *State v. Frady*, 172 N. C. 978, 90 S. E. 802 (1916).

Circumstantial evidence held to sustain conviction of blackmail. *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469 (1948).

ARTICLE 21.

Forgery.

§ 14-119. **Forgery of bank notes, checks and other securities.**—If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this State, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the State, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the State, the person so offending shall be guilty of a felony and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court. (1819, c. 994, s. 1, P. R.; R. C., c. 34, s. 60; Code, s. 1030; Rev., s. 3419; C. S., s. 4293.)

Cross Reference.—As to alleging intent in the indictment, see § 15-151.

Definitions.—The common-law definition of forgery obtains in this State, the statute not attempting to define it. *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

Forgery, at common law, denotes a false making, a making *malò animo*, of any written instrument for the purpose of fraud and deceit. *Peoples Bank, etc., Co. v. Fi-*

delity, etc., Co., 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

Forgery may generally be defined as the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

Elements of Offense.—To constitute an indictable forgery, it is not alone sufficient

that there be a writing, and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud. *Barnes v. Crawford*, 115 N. C. 76, 20 S. E. 386 (1894). While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making or altering of the instrument. *State v. Cross*, 101 N. C. 770, 7 S. E. 715 (1888); *State v. Hall*, 108 N. C. 777, 13 S. E. 189 (1891).

The essentials to the completion of the offense of forgery are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy "apparently capable of effecting a fraud;" (b) the fraudulent intent. *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

An instrument may be a forgery even though in itself it is not false in any particular, if there is a fraudulent intent that the signature should pass or be received as the genuine act of another person whose signing, only, could make the paper valid and effectual. *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

Real and Forged Signatures Need Not Be Identical.—An instrument is nonetheless a forgery because the signature is not identical with that of the person whose signature it is intended to simulate if they are sufficiently similar for the doctrine of *idem sonans* to apply, and the insertion of a middle initial not in the signature simu-

lated is not a fatal variance. *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

A person without a bank account who signs his name to checks and presents them to the bank with intent that the signature should be taken as that of another of the same or similar name who has funds on deposit, and cashes the checks fraudulently and with knowledge that he was withdrawing from the bank the funds of such other person, is guilty of forgery. *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

Indictment Must Allege Existence of Bank.—In an indictment under this section to punish the making, passing, etc., of counterfeit bank notes, if the note alleged to have been passed be of a bank not within the State, the indictment should aver that such a bank exists as that by which the counterfeit note purports to have been issued. *State v. Twitty*, 9 N. C. 248 (1822).

Evidence of Former Acts.—Upon an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the scienter to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried. *State v. Twitty*, 9 N. C. 248 (1822).

Cited in *State v. Peter*, 53 N. C. 19 (1860); *Peoples Bank, etc., Co. v. Fidelity, etc., Co.*, 231 N. C. 510, 57 S. E. (2d) 809, 15 A. L. R. (2d) 996 (1950).

§ 14-120. Uttering forged paper.—If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section; or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or State's prison not less than four months nor more than ten years. (1819, c. 994, s. 2, P. R.; R. C., c. 34, s. 61; Code, s. 1031; Rev., s. 3427; 1909, c. 666; C. S., s. 4294.)

Cross Reference.—As to payment of a forged check, see § 53-52.

Delivering to Agent. — "It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the statute has in view. Hence, upon a similar statute, it was held, that de-

livering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act." *State v. Harris*, 27 N. C. 287 (1844).

Cited in *State v. Jarvis*, 129 N. C. 698, 40 S. E. 220 (1901) (dis. op.).

§ 14-121. Selling of certain forged securities.—If any person shall sell, by delivery, indorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the

person so offending shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years. (R. C., c. 34, s. 63; Code, s. 1033; Rev., s. 3425; C. S., s. 4295.)

§ 14-122. Forgery of deeds, wills and certain other instruments.—If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the State's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court. (5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26; 1801, c. 572, P. R.; R. C., c. 34, s. 59; Code, s. 1029; Rev., s. 3424; C. S., s. 4296.)

Cross References.—As to forgery of certificate of discharge from the armed forces of the United States, see § 47-112. As to uttering a false bill of lading, see § 21-42. As to forgery of trademarks, etc., see §§ 80-12 and 80-13.

General Consideration.—Differing from false pretenses, it is not an element of this offense that the forgery was "calculated to deceive and did deceive;" intent alone suffices to constitute the crime. *State v. Hall*, 108 N. C. 777, 13 S. E. 189 (1891); *State v. Collins*, 115 N. C. 716, 20 S. E. 452 (1894). It is immaterial to whom the advantages of the forgery would accrue. *State v. Cross*, 101 N. C. 770, 7 S. E. 715 (1888).

An instrument in writing on which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. *Barnes v. Crawford*, 115 N. C. 76, 20 S. E. 386 (1894).

To constitute an "order for the delivery of goods," a forgery within the meaning of this section, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered, and if the paperwriting set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under this section, *State v. Lamb*, 65 N. C. 419 (1871); but in such case a conviction will be sustained for the offense at common law. *State v. Leak*, 80 N. C. 403 (1879).

Possession Raises Presumption of Guilt.

—One possessing a forged instrument is presumed to have either forged it or consented to the forgery, and nothing else appearing such holder will be presumed guilty. *State v. Peterson*, 129 N. C. 556, 40 S. E. 9 (1901).

"In *State v. Britt*, 14 N. C. 122 (1831), *Ruffin, J.*, says: 'That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or caused it to be done until he showed the actual perpetrator and that he himself was not privy.' To the same effect is *State v. Morgan*, 19 N. C. 348 (1837). It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same." *State v. Lane*, 80 N. C. 407 (1879).

Lost Instruments.—If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. *State v. Peterson*, 129 N. C. 556, 40 S. E. 9 (1901).

Misspelled Signature.—An indictment lies for forgery of an order for the payment of money, although the signature is misspelled, *State v. Covington*, 94 N. C. 913 (1886); or the names of a firm are in reverse order if it is clear who the parties intended to be designated are. *State v. Lane*, 80 N. C. 407 (1879).

Falsely putting a witness' name to a bond not required to be attested by a subscribing witness does not affect the valid-

ity of the bond, and is not forgery. *State v. Gherkin*, 29 N. C. 206 (1847).

Erasure or Obliteration Not a Forgery.—Obliterating by erasure, or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not according to the law of North Carolina, a forgery. *State v. Thornburg*, 28 N. C. 79 (1845).

Forgery of One of Two Names.—Where the alleged forged instrument has the names of two or more persons affixed, it is sufficient if one of them is proved to have been forged. *State v. Cross*, 101 N. C. 770, 7 S. E. 715 (1888).

Instrument Partly Printed and Partly in

Writing.—An indictment for forging “a certain instrument in writing” is supported by proof of the forgery of an instrument partly printed and partly in writing. *State v. Ridge*, 125 N. C. 655, 34 S. E. 439 (1899).

“Railroad Pass” Insufficiency of Description.—A description of the forged instrument as a “railroad pass” merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. *State v. Weaver*, 94 N. C. 836 (1886).

Cited in *State v. Jarvis*, 129 N. C. 698, 40 S. E. 220 (1901) (dis. op.).

§ 14-123. Forging names to petitions and uttering forged petitions.—If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or State’s prison not exceeding five years, or both, at the discretion of the court; and if any person shall willfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner. (1883, c. 275; Code, s. 1034; Rev., s. 3426; C. S., s. 4297.)

§ 14-124. Forging certificate of corporate stock and uttering forged certificates.—If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be imprisoned in the county jail or State’s prison not less than four months nor more than ten years. (R. C., c. 34, s. 62; Code, s. 1032; Rev., s. 3421; C. S., s. 4298.)

§ 14-125. Forgery of bank notes and other instruments by connecting genuine parts.—If any person shall fraudulently connect together different parts of two or more bank notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged. (R. C., c. 34, s. 66; Code, s. 1037; Rev., s. 3420; C. S., s. 4299.)

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.—No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor. (5 Ric. II, c. 8; R. C., c. 49, s. 1; Code, s. 1028; Rev., s. 3670; C. S., s. 4300.)

Cross Reference.—As to trespass after being forbidden, see § 14-134.

Force.—Actual force or appearances tending to inspire a just apprehension of violence is necessary to constitute the offense. A forcible entry is not proved by evidence of a mere trespass; there must be proof of such force, or at least such show of force, as is calculated to prevent resistance. *State v. Leary*, 136 N. C. 578, 48 S. E. 570 (1904); *State v. Davenport*, 156 N. C. 596, 72 S. E. 7 (1911). So riding into the yard of a house occupied by a woman and remaining there cursing her constitutes force. *State v. Davenport*, *supra*. But where a person, in the absence of the prosecutor, merely unlocked and took off the lock put on by the prosecutor and put his own lock on, without breaking anything or doing any violence, and committed no violence upon the return of the prosecutor, he is not guilty of forcible entry and detainer. *State v. Leary*, *supra*.

Same—Title No Excuse.—The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. *State v. Webster*, 121 N. C. 586, 28 S. E. 254 (1897), where it is said: "As forcible trespass is essentially an offense against the possession of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." *State v. Davenport*, 156 N. C. 596, 72 S. E. 7 (1911).

Original Entry Unlawful.—In order to convict of a misdemeanor under the provisions of this section it is not necessary that the act of going on the lands be unlawful, if the accused thereafter have in overpowering numbers cursed

and abused the one in lawful possession, using threatening and abusive language. *State v. Fleming*, 194 N. C. 42, 138 S. E. 342 (1927).

Same—Title Not Invalid.—The offense of forcible trespass under this section, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction. *State v. Earp*, 196 N. C. 164, 144 S. E. 23 (1928).

Extent of Liability of Title Holder.—The court quoting from *Reeder v. Purdy*, 41 Ill. 279, says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie * * *. Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title." *Mosseller v. Deaver*, 106 N. C. 494, 11 S. E. 529 (1890).

Actual Possession Necessary.—The essential element of the offense of forcible entry is that the lands, etc., must be in the actual possession of him whose possession is charged to have been interfered with. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the

person alleged to be in possession. He need not at all times be personally present on the premises. *State v. Bryant*, 103 N. C. 436, 9 S. E. 1 (1889).

The element of actual possession must be charged in the indictment. *State v. Bryant*, 103 N. C. 436, 9 S. E. 1 (1889). It is a sufficient compliance with this rule to allege that the owner was "then and there in peaceable possession." *State v. Eason*, 70 N. C. 88 (1874).

This section is designed to protect actual possession only, and it is no defense that the accused has title to the locus in quo if the prosecutor be in actual possession of it. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

Right of Tenant at Sufferance.—Where the possession of the prosecutor in forcible entry and detainer is only by sufferance, the prosecution cannot be sustained. *State v. Leary*, 136 N. C. 578, 48 S. E. 570 (1904).

No Accessories.—In misdemeanors there are no accessories, and those who were present in numbers, some armed with

axes and others with guns, while one of their number caused the prosecutor's agents to abandon the locus in quo, were his aiders and abettors and equally guilty of forcible trespass. *State v. Davenport*, 156 N. C. 596, 72 S. E. 7 (1911).

Jurisdiction of a Justice of the Peace.—The distribution of judicial powers by Art. IV of the Constitution is a virtual repeal of all laws giving jurisdiction to justices of the peace in case of forcible entry and detainer, except for the binding of trespassers to the superior court to answer a criminal charge. *State v. Yarborough*, 70 N. C. 250 (1874); *Atlantic, etc., R. Co. v. Sharpe*, 70 N. C. 509 (1874).

Entry under Void Warrant.—Where four or more men enter upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. *State v. Yarborough*, 70 N. C. 250 (1874); *Atlantic, etc., R. Co. v. Johnston*, 70 N. C. 348 (1874).

§ 14-127. Malicious injury to real property.—If any person shall maliciously commit any damage, injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days. (R. C., c. 34, s. 111; 1873-4, c. 176, s. 5; Code, s. 1081; Rev., s. 3677; C. S., s. 4301.)

§ 14-128. Injury to trees, woods, crops, etc., near highway; depositing trash near highway.—Any person, not being on his own lands, or without the consent of the owner thereof, who shall, within one hundred yards of any State highway of North Carolina or within a like distance of any other public road or highway, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower within such limits, or shall deposit any trash, debris, garbage, or litter within such limits, shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty days: Provided, however, that this section shall not apply to the officers, agents, and employees of the State Highway and Public Works Commission or county road authorities while in the discharge of their duties. (Ex. Sess. 1924, c. 54.)

Editor's Note.—It was said in 3 N. C. Law Rev. 25 that it is hoped that this section may prevent the laying waste of gardens, flowers, etc., by tourists who are

not in the habit of regarding another's trash and garbage at every place they property rights and who usually leave stop to eat.

§ 14-129. Taking, etc., of certain wild plants from land of another.—No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any venus fly trap (*Dionaea Muscipula*), trailing arbutus, American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each offense. The provisions of this section shall not apply to the counties of Avery, Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Durham, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Mitchell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan, Swain and Warren. (1941, c. 253; 1951, c. 367, s. 1.)

Editor's Note.—The 1951 amendment inserted in the first sentence the words "venus fly trap (*Dionaea Muscipula*)."

§ 14-129.1. Selling or bartering venus fly trap.—In order to prevent the extinction of the rapidly disappearing rare and unique plant known as the venus fly trap (*Dionaea Muscipula*), it shall be unlawful for any person, firm or corporation to sell or barter or to export for sale or barter, any venus fly trap plant or any part thereof. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: Provided, this section shall not apply to the sale or exportation of the venus fly trap plant for the purposes of scientific experimentation or study when such sale or export for such purposes has been authorized in writing by the Department of Conservation and Development. (1951, c. 367, s. 2.)

§ 14-130. Trespass on public lands.—If any person shall erect a building on any public lands before the same shall have been sold or granted by the State, or on any lands belonging to the State Board of Education before the same shall have been sold and conveyed by them, or cultivate or remove timber from any of such lands, he shall be guilty of a misdemeanor. Moreover, the State Board of Education can recover from any person cutting timber on its land three times the value of the timber which is cut. When any person shall be in possession of any part of such land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, he shall summon the power of the county to assist him in so doing. (1823, c. 1190, P. R.; 1842, c. 36, s. 4; R. C., c. 34, s. 42; Code, s. 1121; Rev., s. 3746; 1909, c. 891; C. S., s. 4302.)

Cited in *Eastern Carolina Land, etc.*, 573 (1888); *Worth v. Commissioners*, 118 Co. v. State Board, 101 N. C. 35, 7 S. E. N. C. 118, 24 S. E. 778 (1896).

§ 14-131. Trespass on land under option by the federal government.—On lands under option which have formally or informally been offered to and accepted by the North Carolina Department of Conservation and Development by the acquiring federal agency and tentatively accepted by said Department for administration as State forests, State parks, State game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any tim-

ber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars or to imprisonment for not to exceed thirty days, or to both such fine and imprisonment.

The Department of Conservation and Development through its legally appointed forestry, fish and game wardens is hereby authorized and empowered to assist the county law enforcement officers in the enforcement of this section. (1935, c. 317.)

§ 14-132. Disorderly conduct in and injuries to public buildings.—

If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the State, or of any county or municipality, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the State or of any county or municipality, or any statue or monument, or shall do or commit any nuisance in or near any public building of the State or of any county or municipality, he shall be guilty of a misdemeanor. The keeper of the capitol or any person in charge of any of such public buildings shall have authority to arrest summarily and without warrant for a violation of this section. The words "public buildings," as used in this section, shall include the grounds around such buildings. (1829, c. 29, ss. 1, 2; 1842, c. 47; R. C., c. 103, ss. 7, 8; Code, s. 2308; Rev., s. 3742; 1915, c. 269; C. S., s. 4303.)

§ 14-133. Erecting artificial islands and lumps in public waters.—

If any person shall erect artificial islands or lumps in any of the waters of the State east of the Atlantic Coast Line Railroad running from Wilmington to Weldon by way of Burgaw, Warsaw, Goldsboro, Wilson, Rocky Mount, and Halifax (formerly the Wilmington and Weldon Railroad) and running from Weldon to the North Carolina-Virginia State boundary by way of Garysburg and Pleasant Hill (formerly the Petersburg and Weldon Railroad), he shall be guilty of a misdemeanor. (1883, c. 109; Code, s. 986; Rev., s. 3543; C. S., s. 4304.)

§ 14-134. Trespass on land after being forbidden; license to look for estrays.—

If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: Provided, that if any person shall make a written affidavit before a justice of the peace of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the justice may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the justice shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (1866, c. 60; Code, s. 1120; Rev., s. 3688; C. S., s. 4305.)

Cross Reference.—As to forcible trespass, see § 14-126.

Essential Ingredients of Offense.—To constitute trespass on the land of another

after notice or warning under this section, three essential ingredients must coexist:

(1) The land must be the land of the prosecutor in the sense that it is in either

his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

This section is designed to protect possession regardless whether it be actual or constructive. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

Entry under Claim of Right.—One who enters upon the land of another under a bona fide claim of right is guilty of no criminal offense. *State v. Crosset*, 81 N. C. 579 (1879). Mere belief of the claim is not sufficient, there must be proof of title or evidence of a reasonable belief of the existence of the right of entry. *State v. Fisher*, 109 N. C. 817, 13 S. E. 878 (1891); *State v. Durham*, 120 N. C. 546, 28 S. E. 22 (1897). This bona fide claim of right must be passed on by a jury before defendant can be convicted. *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906). But the question will not be submitted as a mere abstraction; there must be evidence of a claim or of facts giving rise to a reasonable and bona fide claim. *State v. Faggart*, 170 N. C. 737, 87 S. E. 31 (1915).

It must be noted that entry under a claim of right is a defense only in a criminal action, as ignorance of a trespasser will not exonerate him from civil liability. *State v. Whitener*, 93 N. C. 590 (1885).

In a prosecution under this section, even though the State establish that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus established as an ultimate fact that defendant entered the locus in quo without legal right, defendant may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right, i. e., that he believed he had a right to enter, and that he had reasonable grounds for such belief. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

Land Sought to Be Condemned.—An indictment for willful trespass under this section will lie against an employee of a railroad company for an entry after being forbidden on land which the company is seeking to condemn, the entry being for the purpose of constructing the road and before an appraisal has been made, although a restraining order against such a trespass would be refused. *State v. Wells*, 142 N. C. 590, 55 S. E. 210 (1906).

Entry by Husband on Wife's Property.

—A husband is not subject to the rule of this section, in regard to property of his wife, and although she may forbid him to enter he may enter nevertheless. *State v. Jones*, 132 N. C. 1043, 43 S. E. 939 (1903).

Entry as Servant.—Upon the trial under an indictment for trespass on lands after being forbidden, it is no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad. Evidence that such superior officer therein acted by the advice of counsel learned in the law is incompetent. *State v. Mallard*, 143 N. C. 666, 57 S. E. 351 (1907).

One who enters upon the land of another, after being forbidden, as the servant, and at the command of a bona fide claimant, is not guilty of any criminal offense. *State v. Winslow*, 95 N. C. 649 (1886).

Entry by Former Tenant to Gather Crops.—For a conviction under the provisions of this section for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser peacefully entered upon a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. *State v. Faggart*, 170 N. C. 737, 87 S. E. 31 (1915).

Entry as Guest of Tenant.—One forbidden by the landlord to enter his land is not guilty under this section if he enters a part of the land in the possession of a tenant and as a guest of the tenant. *State v. Lawson*, 101 N. C. 717, 7 S. E. 905 (1888).

License to Enter Must Be Negated in Indictment.—In an indictment for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be distinctly negated as an essential part of the description of the offense. *State v. Bullard*, 72 N. C. 445 (1875).

An indictment in which it is charged that the defendant did unlawfully enter

upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., is sufficient. *State v. Whitehurst*, 70 N. C. 85 (1874).

Court Having Jurisdiction.—Justices of the peace have exclusive original jurisdiction of the offense under this section. *State v. Dudley*, 83 N. C. 660 (1880).

In *State v. Presly*, 72 N. C. 204 (1875), the rule at that time was held to be that justices of the peace and superior courts had concurrent jurisdiction and after six months the superior court had exclusive jurisdiction. In *State v. Edney*, 80 N. C. 360 (1879), the court held that because of the wording of the statute and Art. IV, § 33 of the Constitution justices of the peace had no jurisdiction. These irregularities were removed by legislation, and *State v. Dudley*, supra, construed this section as it was no doubt originally intended by the legislature to be construed.

Warrant May Be Amended.—The superior court has power to amend, after verdict, a warrant brought by appeal of defendant from a justice's court, charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "willful and unlawful," and to make the charge conclude, "against the peace and dignity

of the State." *State v. Smith*, 103 N. C. 410, 9 S. E. 200 (1889).

Warrant with Affidavit Attached.—A warrant for trespass will not be quashed because it does not contain the necessary descriptive words of the alleged offense, when it refers to an "annexed affidavit" in which all the essential averments are made, as the reference to the affidavit makes it a part of the warrant. *State v. Winslow*, 95 N. C. 649 (1886).

Evidence Not Establishing Prosecutor's Possession.—Where, in a prosecution under this section the only evidence offered by the State as to title of prosecutor is oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, held, defendant's motion to nonsuit should have been granted, since the evidence is insufficient to establish prosecutor's possession of the land within the meaning of this section. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

Applied in *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244 (1945).

Cited in *State v. Holmes*, 120 N. C. 573, 26 S. E. 692 (1897); *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (1906).

§ 14-135. Cutting, injuring, or removing another's timber.—If any person, not being the bona fide owner thereof, shall knowingly and willfully cut down, injure or remove any standing, growing or fallen tree or log, the property of another, he shall be guilty of a misdemeanor, and shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than thirty days. (1889, c. 168; Rev., s. 3687; C. S., s. 4306.)

Local Modification.—Burke, Caldwell, Cherokee, McDowell, Mitchell, Watauga, Wilkes, Yadkin: C. S. 4307, 4308; Duplin: 1929, c. 174.

Cross Reference.—As to larceny of wood from land, see § 14-80.

Prosecutor's Ownership of Land Essential.—The crime of unlawfully cutting,

injuring or removing another's timber as defined by this section is an offense against the freehold rather than the possession, and ownership of the property by the prosecutor is a sine qua non to conviction. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

§ 14-136. Setting fire to grass and brush lands and woodlands.—If any person shall intentionally set fire to any grassland, brushland or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for a period of not less than sixty days nor more than four months for the first offense, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year. If willful or malicious intent to damage the property of another shall be shown, said person shall be guilty of a felony, and shall, upon

conviction, be punished by imprisonment in the State prison for not less than one nor more than five years. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the State evidence sufficient for the conviction of a violation of this statute shall receive the sum of fifty dollars, to be taxed as part of the court costs. (1777, c. 123, ss. 1, 2, P. R.; R. C., c. 16, ss. 1, 2; Code, ss. 52, 53; Rev., s. 3346; 1915, c. 243, ss. 8, 11; 1919, c. 318; C. S., s. 4309; 1925, c. 61, s. 1; 1943, c. 661.)

Local Modification.—Graham: Pub. Loc. 1933, c. 301; Onslow: 1929, c. 185, 1939, c. 160.

Editor's Note.—Prior to the 1925 amendment the punishment was "a fine not less than ten dollars or more than fifty dollars, or imprisonment not exceeding thirty days", and the sum provided for one furnishing State evidence was twenty dollars.

The 1943 amendment inserted the second sentence. For comment on amendment, see 21 N. C. Law Rev. 346.

This section formerly provided only for setting fire to woodland, and one who let fire escape while burning other lands was not liable, under this section, *Averitt v. Murrell*, 49 N. C. 322 (1857); but was only liable for negligence. *Cato v. Toler*, 160 N. C. 104, 75 S. E. 929 (1912). In *Hall v. Crawford*, 50 N. C. 3 (1857) it was held that "an old field which had turned out without any fence around it and which had grown up in broom sedge and pine bushes" came within the meaning of woodland. This case was pointed out in *Achenback v. Johnston*, 84 N. C. 264 (1881), as stretching the doctrine of liability too far. There it was held that a field grown up in grass and used as a pasture was not woodland. By Public Laws 1915, c. 243, this section was made applicable to setting fire to grassland and brushland as well as woodland, so the prior constructions so strictly made in regard to firing woodland are no longer applicable as this section now seems to cover burning of any lands.

Care No Defense.—If one firing woods fails to give the statutory notice to adjoining owners and damages ensue, the cause of action is complete, no matter what degree of care may have been shown. *Lamb v. Sloan*, 94 N. C. 534 (1886).

Waiver of Notice Bars Damages.—A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. *Roberson v. Kirby*, 52 N. C. 477 (1860); *Lamb v. Sloan*, 94 N. C. 534 (1886). Waiver when made by a ten-

ant in common while in possession is also a sufficient defense. See *Stanland v. Rousk*, 168 N. C. 568, 84 S. E. 845 (1915).

Waiver by Adjoining Owner No Bar to Penalty.—When an adjoining owner waives notice of the intended fire such waiver does not waive the penalty of this section, but is only a waiver of the landowner's right of action for damages to his land caused by the spreading of the fire. *Lamb v. Sloan*, 94 N. C. 534 (1886).

Liability to One Not an Adjoining Owner.—The notice required by this section applies only to adjoining owners and one is not subject to the penalty for failure to give notice to one who is not an adjoining owner, but by the express terms of the statute there is a liability in damages for damages to "any property." See *Robinson v. Morgan*, 118 N. C. 991, 24 S. E. 667 (1896).

Firing to Protect Property.—In the case of *Lamb v. Sloan*, 94 N. C. 534 (1886), it was held that if one set fire to his property to protect it he was not liable under the statute in force at that time which provided the act must be "wilfull."

No Evidence to Show Fire Started by Defendant.—Where the evidence tends only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there is neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority, a judgment as of nonsuit is proper. *Sutton v. Herrin*, 202 N. C. 599, 163 S. E. 578 (1932).

Burning Off Railroad Right of Ways.—In case of *Nizzell v. Bramming Mfg. Co.*, 158 N. C. 265, 73 S. E. 802 (1912), it was held under a prior statute, similar in some respects to this except that it did not provide against burning grassland and brushland, that the statute did not apply to railroads burning off their rights of way that were covered with grass and tree tops.

Action to Recover Penalty.—Action for

a recovery of penalties provided for by this section may be brought before any justice of the peace where service can be

had on the defendant. *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799 (1891).

§ 14-137. Wilfully or negligently setting fire to woods and fields.—

If any person, firm or corporation shall wilfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields, whatsoever, every such offender, upon conviction, shall be fined or imprisoned in the discretion of the court. This section shall apply only in those counties under the protection of the State forest service in its work of forest fire control. It shall not apply in the case of a land-owner firing, or causing to be fired, his own open, non-wooded lands, or fields in connection with farming or building operations at the time and in the manner now provided by law: Provided, he shall have confined the fire at his own expense to said open lands or fields. (1907, c. 320, ss. 4, 5; C. S., s. 4310; 1925, c. 61, s. 2; 1941, c. 258.)

Editor's Note.—Prior to the 1941 amendment this section applied only to certain named counties.

Evidence that the county in which defendant negligently or wilfully started forest fires was in charge of the State forest service and that this section was

applicable to the county, defendant having offered no evidence to the contrary, was sufficient to show a violation of the section. *State v. Patton*, 221 N. C. 117, 19 S. E. (2d) 142 (1942).

Cited in *Lumber Co. v. Hayes*, 157 N. C. 333, 72 S. E. 1078 (1911).

§ 14-138. Setting fire to woodlands and grasslands with campfires.

—Any wagoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grassland, brushland or woodland without fully extinguishing the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment not exceeding thirty days. For the purposes of this section the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. (Code, s. 54; 1885, c. 126; Rev., s. 3347; 1913, c. 8; 1915, c. 243, ss. 9, 11; C. S., s. 4311.)

Local Modification. — Graham: Pub. Loc. 1933, c. 301.

§ 14-139. Starting fires within five hundred feet of areas under protection of State forest service.—It shall be unlawful for any person, firm

or corporation to start or cause to be started any fire or ignite any material in any of the areas of woodlands under the protection of the State forest service or within five hundred feet of any such protected area, between the first day of February and the first day of June, inclusive or between the first day of October and the thirtieth day of November, inclusive, in any year, without first obtaining from the State Forester or one of his duly authorized agents a permit to set out fire or ignite any material in such above mentioned protected areas; no charge shall be made for the granting of said permits. This section shall not apply to any fires started or caused to be started within five hundred feet of a dwelling house. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty (50) dollars, or imprisoned for a period of not more than thirty (30) days. (1937, c. 207; 1939, c. 120.)

Editor's Note.—The 1939 amendment tion, and the last sentence as to punishment changed the dates mentioned in this section.

§ 14-140. Certain fires to be guarded by watchman.—All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to

or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not exceeding thirty days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions. (1915, c. 243, s. 10; C. S., s. 4312.)

Local Modification. — Graham: Pub. Loc. 1933, c. 301.

Cited in State v. Swanson, 223 N. C. 442, 27 S. E. (2d) 122 (1943).

§ 14-141. Burning or otherwise destroying crops in the field.—If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than five years. (1874-5, c. 133; Code, s. 985, subsec. 2; 1885, c. 42; Rev., s. 3339; C. S., s. 4313.)

Cross Reference.—As to arson, see § 14-58 et seq.

Out of Doors Defined.—One who burns cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N. C. 798, 13 S. E. 931 (1891).

Formerly Misdemeanor.—The burning provided in this section was at one time a misdemeanor. State v. Huskins, 126 N. C. 1070, 35 S. E. 608 (1900).

Indictment. — An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder without charging the burning, is defective. State v. Hall, 93 N. C. 571 (1885).

It is not necessary under this section to aver in the indictment that the stack burned was "out of doors." State v. Huskins, 126 N. C. 1070, 35 S. E. 608 (1900).

§ 14-142. Injuries to dams and water channels of mills and factories.—If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be fined or imprisoned, or both, at the discretion of the court. (1866, c. 48; Code, s. 1087; Rev., s. 3678; C. S., s. 4315.)

Obstruction below Dam or Channel.—This section only applies to obstructions and damages to the dam or channel and an indictment cannot be had for obstruc-

tions below the dam or channel. State v. Tomlinson, 77 N. C. 528 (1877).

Cited in State v. Suttle, 115 N. C. 784, 20 S. E. 725 (1894).

§ 14-143. Taking unlawful possession of another's house.—If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. (1893, c. 347; Rev., s. 3685; C. S., s. 4316.)

Local Modification.—Durham: 1929, c. 109.

Editor's Note.—See note to § 14-134.

§ 14-144. Injuring houses, churches, fences and walls.—If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this chapter in the article entitled Arson and Other Burn-

ings; or shall unlawfully and willfully burn, demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor. (R. C., c. 34, s. 103; Code, s. 1062; Rev., s. 3673; C. S., s. 4317.)

I. Houses.

II. Fences around Fields.

Cross References.

See § 14-159. As to willful destruction by a tenant, see § 42-11. As to willful destruction of a fence which does not enclose something, see § 68-4. As to injury to stock-law fences, see § 68-36.

I. HOUSES.

Trespass Necessary Part of Offense.—

It is held, to constitute a criminal offense under this section, there must be a trespass. *State v. Williams*, 44 N. C. 197 (1853); *State v. Watson*, 86 N. C. 626 (1882); *State v. McCracken*, 118 N. C. 1240, 24 S. E. 530 (1896). And a party in lawful possession cannot commit a trespass upon the property he is in possession of. *Dobbs v. Gullidge*, 20 N. C. 197 (1838); *State v. Reynolds*, 95 N. C. 616 (1886); *State v. Howell*, 107 N. C. 835, 12 S. E. 569 (1890). Therefore, according to the logic of these decisions, if a defendant is shown to have been in the actual possession of the house at the time he tore it down, he committed no criminal offense under this section. We say the lawful possession, to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. *State v. Jones*, 129 N. C. 508, 39 S. E. 795 (1901).

Tenant's and Landlord's Liability to One Another.—A tenant is not subject under this section for damage done to property in his possession, but the owner of the reversion would be subject to prosecution for damage to property in the possession of a tenant, as the statute covers offences against possession. *State v. Mason*, 35 N. C. 341 (1852); *State v. White-ner*, 92 N. C. 798 (1885).

A tenant cannot divest the possession of his landlord by an attempted attornment to another, and if the person to whom the attempted attornment is made enters the land and damages buildings he is liable under this section, in spite of proof of good faith and claim of title. *State v. Howell*, 107 N. C. 835, 12 S. E. 569 (1890).

Same—Tenant at Sufferance. — If a building is torn down by a landlord while it is in the possession of a tenant at suf-

ferance an indictment under this section cannot be supported, for this section was intended to protect property which the tenant at sufferance has no interest in. *State v. Mace*, 65 N. C. 344 (1871).

Houses Erected through Mistake.—

One who peaceably enters upon lands believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under this section. *State v. Reynolds*, 95 N. C. 616 (1886).

School Houses Held by Adverse Possession.—

If defendants are in the adverse possession of the schoolhouse and bona fide claiming it as their own, it is not a crime in them to pull it down. *State v. Roseman*, 66 N. C. 634 (1872).

"Other Houses."—It is manifest that the words "other house or building," embrace a jail, a jailhouse or building. *State v. Bryan*, 89 N. C. 531 (1883).

Dynamiting a Crib.—An indictment will lie under this section for injury to a crib by an explosion of dynamite. See *State v. Martin*, 173 N. C. 808, 92 S. E. 597 (1917).

II. FENCES AROUND FIELDS.

Cultivated Field Defined. — Where a piece or tract of land has been cleared and fenced, and cultivated, or proposed to be cultivated and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a "cultivated field" within the description of the statute. *State v. Allen*, 35 N. C. 36 (1851); *State v. McMinn*, 81 N. C. 585 (1879).

The ruling in *State v. Allen*, 35 N. C. 36 (1851), was cited and approved in *State v. McMinn*, 81 N. C. 585 (1879), in which case it was also held that the smallness of the tract made no difference; that a town lot, if inclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described. *State v. Campbell*, 133 N. C. 640, 45 S. E. 344 (1903).

Fence Must Enclose Something.—It is necessary under this section that the fence destroyed or injured surround or enclose something and a fence along a road to prevent passersby from turning into the field to avoid mud in the road, when not connected with any other fence is not within the meaning of this section. See *State v. Roberts*, 101 N. C. 744, 7 S. E. 714 (1888).

Instruction That Pasture Is a Field.—Where in a criminal prosecution for the violation of this section providing that a person removing a fence surrounding “any yard, garden, cultivated field, or pasture” should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture, the word “pasture” and “cultivated field” are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. *State v. Cornett*, 199 N. C. 634, 155 S. E. 451 (1930).

Title to Land No Defense.—It is well settled that where the State, in an indictment under this section, for unlawfully and wilfully removing a fence, shows actual possession in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence was situated. *State v. Graham*, 53 N. C. 397 (1861); *State v. Hovis*, 76 N. C. 117 (1877); *State v. Marsh*, 91 N. C. 632 (1884); *State v. Howell*, 107 N. C. 835, 12 S. E. 569 (1890); *State v. Fender*, 125 N. C. 649, 34 S. E. 448 (1899); *State v. Campbell*, 133 N. C. 640, 45 S. E. 344 (1903); *State v. Taylor*, 172 N. C. 892, 90 S. E. 294 (1916).

Question of Title Cannot Be Raised.—Where a party has neither possession, nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defence to him that he did the act to bring on a civil suit in order to try the title. *State v. Graham*, 53 N. C. 397 (1861).

Agency No Defense.—Under an indictment

for tearing down a fence the defendant cannot avoid liability by showing that he acted as agent for another. *State v. Campbell*, 133 N. C. 640, 45 S. E. 344 (1903).

Destroying Fence When Line Is in Dispute.—Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. *State v. Watson*, 86 N. C. 626 (1882); *State v. Fender*, 125 N. C. 649, 34 S. E. 448 (1899). Nor is a quasi tenant occupying by the consent of the owner subject to prosecution under this section for the removal of a fence. *State v. Williams*, 44 N. C. 197 (1853).

Right to Reclaim Fence.—Although rails of which a fence around an enclosure is made were taken from the land of another, no right to go on the land and remove the fence exists in favor of the person from whom the rails were taken as the fence is a part of the realty, and such a trespass comes within the meaning of this section. *State v. McMinn*, 81 N. C. 585 (1879).

Applicable to Wire Fences.—An indictment for cutting and destroying a wire fence may be maintained under this section if it charges that the wire fence was an enclosure. *State v. Biggers*, 108 N. C. 760, 12 S. E. 1024 (1891).

Defective Bill of Indictment.—A motion in arrest of judgment after conviction for a removal of fences on the ground that the bill of indictment is defective, will not be granted, unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *State v. Taylor*, 172 N. C. 892, 90 S. E. 294 (1916).

Fences across a Street Removed by Officer.—A fence erected across a public street is a public nuisance, and a city marshal will not be liable for abating the nuisance by pulling it down. *State v. Godwin*, 145 N. C. 461, 59 S. E. 132 (1907).

§ 14-145. Unlawful posting of advertisements.—Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile, building, or other object, which is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, mile-stone, danger-sign, danger-signal, guide-sign, guide-post, automobile, building or other object within the limits of a public highway,

shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty (30) days. (Ex. Sess. 1924, c. 109.)

Cross Reference.—As to injuring, defacing, or destroying notices and advertisements, see §§ 14-384 and 14-385.

Editor's Note.—It was suggested in 3 N. C. Law Rev. 25 that the first part of

this section seems to apply to posting advertisements anywhere on private property, while the last part applies to those posted within the limits of the public highway.

§ 14-146. **Injuring bridges.**—If any person shall unlawfully and willfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the State, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court. (1883, c. 271; Code, s. 993; Rev., s. 3771; C. S., s. 4318.)

§ 14-147. **Removing, altering or defacing landmarks.**—If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested. (1858-9, c. 17; Code, s. 1063; Rev., s. 3674; 1915, c. 248; C. S., s. 4319.)

Removal of Stakes.—As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. *State v. Jenkins*, 164 N. C. 527, 80 S. E. 231 (1913).

Indictment Must Aver.—An indictment charging that one A. B., with force and

arms, etc., willfully and unlawfully did alter, and deface and remove a corner tree, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the proviso to the act creating the offense. *State v. Bryant*, 111 N. C. 693, 16 S. E. 326 (1892).

§ 14-148. **Removing or defacing monuments and tombstones.**—If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully and on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor. (1840, c. 6; R. C., c. 34, s. 102; Code, s. 1088; Rev., s. 3680; C. S., s. 4320.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality and removal of monuments and graves, see § 160-200, paragraph 36. See note to § 14-150.

Right of Landowner to Remove.—Where the owner of land consents, either expressly or by implication to the interment of dead bodies on his land, he has no right to afterwards remove the bodies or to deface or pull down the gravestones and monuments erected to perpetuate their memory. *State v. Wilson*, 94 N. C. 1015 (1886).

Indictment.—It is not necessary, to charge in the indictment that the monument removed was intended to designate the spot where the dead body of a particular person named, or a person unknown, was interred. *State v. Wilson*, 94 N. C. 1015 (1886).

It is not necessary to charge in terms that the dead body was that of a dead person. *State v. Wilson*, 94 N. C. 1015 (1886).

Generally.—This section creates a misdemeanor not defined as larceny. *State v. Jackson*, 218 N. C. 373, 11 S. E. (2d) 149 (1940).

§ 14-149. Interfering with graveyards.—If any person shall unlawfully take away any stone, brick, iron or other material that encloses private graveyards, or shall cut or keep open any ditch or drainway, or put any permanent log or other obstruction not intended as a monument to a grave in such graveyards, or knowingly plow over and tear up any grave, or shall remove or change the location of any fence around such graveyard without the consent of such person or persons as may have parents, children or brothers or sisters buried therein, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than ten dollars or imprisoned not more than thirty days. (1889, c. 130; Rev., s. 3681; 1919, c. 218; C. S., s. 4321.)

§ 14-150. Disturbing graves.—If any person shall, without due process of law, or the consent of the surviving husband or wife or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1885, c. 90; Rev., s. 3672; C. S., s. 4322.)

Cross References.—As to removal after abandonment, see § 65-15. As to abandonment of a cemetery by a municipality and removal of monuments and graves, see § 160-200, paragraph 37.

Intent.—The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. *State v. McLean*, 121 N. C. 589, 28 S. E. 140 (1897).

Persons Liable.—The mayor or other town officers counseling their subordinates

to remove bodies are liable under this section although they were honestly mistaken as to the scope of their official power. *State v. McLean*, 121 N. C. 589, 28 S. E. 140 (1897).

When Lot Is Not Paid For.—The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. *State v. McLean*, 121 N. C. 589, 28 S. E. 140 (1897).

§ 14-151. Interfering with gas, electric and steam appliances.—If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subsections, he shall be guilty of a misdemeanor:

1. Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

2. Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

3. In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

4. Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stop-cock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifices of mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stop-cock or valve, or to make

such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stop-cocks, wires or other appliances of such, as the case may be; or,

5. Retain possession of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

6. Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gate-boxes, valves, stop-cocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

7. Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or,

8. Turn on steam or cause it to be turned on or to reënter any premises when the same has been lawfully stopped from entering such premises. (1901, c. 735; Rev., s. 3666; C. S., s. 4323.)

§ 14-152. Injuring fixtures and other property of gas companies; civil liability.—If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury. (1889 (Pr.), c. 35, s. 3; Rev., s. 3671; C. S., s. 4324.)

§ 14-153. Tampering with engines and boilers.—If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor. (1901, c. 733; Rev., s. 3667; C. S., s. 4325.)

Cited in *State v. Hargett*, 196 N. C. 692,
146 S. E. 801 (1929).

§ 14-154. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.—If any person shall willfully injure, destroy or pull down any telegraph, telephone or electric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court. (1881, c. 4; 1883, c. 103; Code, s. 1118; Rev., s. 3847; 1907, c. 827, s. 1; C. S., s. 4326.)

§ 14-155. Making unauthorized connections with telephone and telegraph wires.—It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days for each offense. Each day's continuance of such unlawful connection shall be a separate offense. (1911, c. 113; C. S., s. 4327.)

§ 14-156. Injuring fixtures and other property of electric-power companies.—It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court. (1907, c. 919; C. S., s. 4328.)

§ 14-157. Felling trees on telephone and electric-power wires.—If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to penalty of fifty dollars for each and every offense. (1903, c. 616; Rev., s. 3849; 1907, c. 827, s. 2; C. S., s. 4329.)

§ 14-158. Interfering with telephone lines.—If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of the wire of a telephone line, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned for a term not exceeding two years, in the discretion of the court. (1901, c. 318; Rev., s. 3845; C. S., s. 4330.)

Civil Action for Damages.—The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by this section, and where such act has caused damages to another the action sounds in tort, making

the tortfeasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. *Hodges v. Virginia-Carolina R. Co.*, 179 N. C. 566, 103 S. E. 145 (1920).

§ 14-159. Injuring buildings or fences; taking possession of house without consent.—If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1929, c. 192, s. 1.)

Cross References. — See also, § 14-144.
As to willful destruction by a tenant, see § 42-11.

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Malicious injury to personal property.—If any person shall wantonly and willfully injure the personal property of another, he shall be guilty

of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (1876-7, c. 18; Code, s. 1082; 1885, c. 53; Rev., s. 3676; C. S., s. 4331.)

Cross Reference.—As to definition of personal property, see § 12-3, par. 6.

Things That Are Personalty.—A promissory note or due bill being an "evidence of debt" is personal property within the meaning of this section and § 12-3, par. 6. *State v. Sneed*, 121 N. C. 614, 28 S. E. 365 (1897).

An electric streetcar is personalty and not a fixture. *State v. Sneed*, 121 N. C. 614, 28 S. E. 365 (1897).

Proof of the destruction of a fence erected upon land was held to be insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there was a fatal variance between allegation of ownership of the realty and proof. *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949).

Malice Not Necessary.—It is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and willfully injures it nor is it material whether the property was destroyed or not. *State v. Sneed*, 121 N. C. 614, 28 S. E. 365 (1897).

"Wantonly and Wilfully" Necessary.—An indictment for injury to personal property, under this section, which charged that the act was "wantonly and wilfully" done, was not defective because it did not aver the act to have been unlawfully perpetrated. Lawful acts are not done wantonly and wilfully. *State v. Martin*, 107 N. C. 904, 12 S. E. 194 (1890).

§ 14-161. Malicious removal of packing from railway coaches and other rolling stock.—If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, car, caboose or truck used or operated upon any railroad whether the same be operated by steam or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or State's prison, in the discretion of the court. (1905, c. 335; Rev., s. 3759; C. S., s. 4332.)

§ 14-162. Removing boats or their fixtures and appliances.—If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same, any boat, canoe, pettiaugua, oars, paddles, sails or tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such property, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (R. C., c. 14, ss. 1, 3; Code, s. 2288; 1889, c. 378; Rev., s. 3544; C. S., s. 4333.)

But an indictment cannot be sustained under this section if there is neither an allegation nor finding that the injury was "wilfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183 (1894).

Malicious Mischief at Common Law.—This section was not intended to supersede the common law as to malicious mischief, and though malice must be charged at common law it is not necessary under this section. *State v. Martin*, 141 N. C. 832, 53 S. E. 874 (1906).

No Accessories.—As there are no accessories in misdemeanors, the offence under this section may be committed jointly by several persons, one doing the act the others aiding and abetting or participating. *State v. Martin*, 141 N. C. 832, 53 S. E. 874 (1906).

Destroying Whisky.—The mere possession of whisky gives no title; and a revenue officer who seizes a barrel concealed on private premises, and in good faith destroys it, is not guilty of a misdemeanor or under this section. *North Carolina v. Vanderford*, 35 F. 282 (1888).

Conviction under This Section in Place of § 14-165.—Where there is an erroneous conviction under this section, when the indictment should have been drawn under § 14-165, et seq., the prisoner should be discharged with permission to the solicitor to send another bill, if so advised. *State v. Reed*, 196 N. C. 357, 145 S. E. 691 (1928).

§ 14-163. Injuring livestock not inclosed by lawful fence.—If any person shall willfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court. (1868-9, c. 253; Code, s. 1003; Rev., s. 3313; C. S., s. 4334.)

At Common Law.—Wounding of cattle maliciously is not an indictable offense at common law. *State v. Manual*, 72 N. C. 201 (1875).

Purpose of Section. — The obvious purpose of the statute is to prohibit and prevent every person from unlawfully and wilfully killing and abusing livestock of another, that may get into and trespass upon inclosures not surrounded and protected by a lawful fence. This is the mischief to be suppressed. *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779 (1887).

Offense May Be Completed Elsewhere.—In order to complete the offense of injury to livestock, it is not necessary that the offense should be consummated within the inclosure not surrounded by a lawful fence, for if it is begun therein and completed outside of such inclosure, the offense is complete. *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779 (1887).

Cattle Defined.—The word "cattle" has a restricted sense which applies only to the bovine species, and also a broader meaning which includes all domestic animals. That it is used in this section in the latter and broader sense is apparent from the context, "horse, mule, hog, sheep or other cattle."

State v. Groves, 119 N. C. 822, 25 S. E. 819 (1896).

Injuries in Enclosed Fields.—A person is not liable under this section for injuring stock within his own field which is enclosed and under cultivation. *State v. Waters*, 51 N. C. 276 (1859).

Indictment Must Charge. — An indictment for injuring stock under this section must charge that the cattle abused or killed were property of some one, the abusing or killing must be charged to have been wilfully and unlawfully done while the animal was in an inclosure not surrounded by a lawful fence. *State v. Simpson*, 73 N. C. 269 (1875); *State v. Deal*, 92 N. C. 802 (1885).

An indictment charging an offense under this section but not setting out who owned the inclosure, although not encouraged because of its looseness, is sufficient. *State v. Allen*, 69 N. C. 23 (1873); *State v. Painter*, 70 N. C. 70 (1874).

"The Field" Is Too General.—An indictment which simply charges the injury, etc., to have been committed on stock in "the field" is not certain to that extent required in such pleading. *State v. Staton*, 66 N. C. 640 (1872).

§ 14-164. Taking away or injuring exhibits at fairs.—If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition. (1870-1, c. 184, s. 4; Code, s. 2796; Rev., s. 3668; C. S., s. 4335.)

Cross Reference.—As to fraudulent entries at fairs, see § 14-116.

ARTICLE 24.

Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.

§ 14-165. Malicious or wilful injury to hired personal property.—Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, for temporary use, who shall maliciously or wilfully injure or damage the same by in any way using or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of

a misdemeanor and subject to punishment as hereinafter provided. (1927, c. 61, s. 1.)

Cross Reference.—See annotation under § 14-160.

§ 14-166. **Subletting of hired property.**—Any person who shall rent or hire, for temporary use, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sublet or rent the same to any other person, firm or corporation, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 2.)

§ 14-167. **Failure to return hired property.**—Any person who shall rent or hire, for temporary use, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other vehicle, and who shall wilfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for which such property has been rented or hired, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 3.)

§ 14-168. **Hiring with intent to defraud.**—Any person who shall, with intent to cheat and defraud the owner thereof of the rental price therefor, hire or rent for temporary use any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a misdemeanor and punished as hereinafter provided. (1927, c. 61, s. 4.)

§ 14-169. **Violation made misdemeanor.**—Any person violating the provisions of this article shall be guilty of a misdemeanor and punished at the discretion of the court. (1927, c. 61, s. 5; 1929, c. 38, s. 1.)

Editor's Note.—Prior to the 1929 amendment, this section provided for a maximum fine of fifty dollars and a maximum jail sentence of thirty days.

ARTICLE 25.

Regulating the Leasing of Storage Batteries.

§ 14-170. **"Rental battery" defined; identification of rental storage batteries.**—As used in this article the words "rental battery" are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such rental batteries belonging to them with the word "rental," or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation. (1933, c. 185, s. 1.)

§ 14-171. **Defacing word "rental" prohibited.**—It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word "rental" on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify the same as belonging to or being the property of any person, firm or corporation. (1933, c. 185, s. 2.)

§ 14-172. **Sale, etc., of rental battery prohibited.**—It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner as provided by § 14-170. (1933, c. 185, s. 3.)

§ 14-173. Repairing another's rental battery prohibited.—It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner thereof as provided by § 14-170. (1933, c. 185, s. 4.)

§ 14-174. Time limit on possession of rental battery without written consent.—It is unlawful for any person, firm or corporation to retain in his, their or its possession for a longer period than ten (10) days, without the written consent of the owner, any rental battery marked as such by the owner as provided by § 14-170. Demand must be made on any person who so retains a rental battery in his possession at least five days before a prosecution can be instituted: Provided, however, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand. (1933, c. 185, s. 5.)

§ 14-175. Violation made misdemeanor.—Any person, firm or corporation, and the officers, agents, employees, and members of any firm or corporation violating any of the provisions of §§ 14-170 to 14-174 shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding fifty dollars or be imprisoned for a term of not exceeding thirty days in the discretion of the court. (1933, c. 185, s. 6.)

§ 14-176. Rebuilding storage batteries out of old parts and sale of, regulated.—Any person, firm or corporation who assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of second-hand or used material such as containers, separators, plates, groups or other battery parts, and sells same or offers same for sale in the State of North Carolina without the word "rebuilt" placed in the side of the container, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars or imprisoned for a term not exceeding six months or both. (1933, c. 535.)

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.—If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the State's prison not less than five nor more than sixty years. (5 Eliz., c. 17; 25 Hen. VIII, c. 6; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; Code, s. 1010; Rev., s. 3349; C. S., s. 4336.)

Scope of Section.—This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. *State v. Griffin*, 175 N. C. 767, 94 S. E. 678 (1917). It includes unnatural intercourse between male and male. *State v. Fenner*, 166 N. C. 247, 80 S. E. 970 (1914).

Conviction for Attempt.—Upon the trial of an indictment for the crime against

nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. *State v. Savage*, 161 N. C. 245, 75 S. E. 238 (1912).

Applied in *State v. Callett*, 211 N. C. 563, 191 S. E. 27 (1927); *State v. Spivey*, 213 N. C. 45, 195 S. E. 1 (1938).

Cited in *State v. Reid*, 230 N. C. 561, 53 S. E. (2d) 849 (1949).

§ 14-178. Incest between certain near relatives.—In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony,

and shall be punished for every such offense by imprisonment in the State's prison for a term not exceeding fifteen years, in the discretion of the court. (1879, c. 16, s. 1; Code, s. 1060; Rev., s. 3351; 1911, c. 16; C. S., s. 4337.)

In General. — Incest was not indictable at common law. *State v. Sauls*, 190 N. C. 810, 130 S. E. 848 (1925), and cases cited. The amendment of 1911 increasing the punishment was held not retroactive. *State v. Broadway*, 157 N. C. 598, 72 S. E. 987 (1911).

Carnal intercourse by the father with his illegitimate daughter constitutes the offense. *State v. Lawrence*, 95 N. C. 659 (1886). Both parties are not necessarily guilty. *Strider v. Lewey*, 176 N. C. 448, 97 S. E. 398 (1918).

Evidence. — Confessions of the wife to the husband are not admissible in a trial for incest. *State v. Brittain*, 117 N. C. 783, 23 S. E. 433 (1895). But proof of other similar acts is competent in corroboration.

§ 14-179. Incest between uncle and niece and nephew and aunt.— In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, in the discretion of the court. (1879, c. 16, s. 2; Code, s. 1061; Rev., s. 3352; C. S., s. 4338.)

With Daughter of Half Sister.—It has been held under this section that carnal intercourse of a man with the daughter of

State v. Broadway, 157 N. C. 598, 72 S. E. 987 (1911).

In a prosecution under this section for an offense allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. *State v. Edwards*, 224 N. C. 527, 31 S. E. (2d) 516 (1944).

Failure to Charge "Carnal" Knowledge.—The mere fact that indictment failed to charge "carnal" knowledge, is not a fatal defect that would sustain the defendant's motion to quash the indictment. *State v. Sauls*, 190 N. C. 810, 130 S. E. 848 (1925).

his half sister is incest. *State v. Harris*, 149 N. C. 513, 62 S. E. 1090 (1908).

§ 14-180. Seduction.—If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State prison not exceeding the term of five years: Provided, the unsupported testimony of the woman shall not be sufficient to convict: Provided further, that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of nolo contendere, and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for non-payment of the same. (1885, c. 248; Rev., s. 3354; 1917, c. 39; C. S., s. 4339.)

Who May Be Convicted. — A male, at the marriageable age of 18 years, is indictable for seduction under this section. *State v. Creed*, 171 N. C. 837, 88 S. E. 511 (1916).

Distinguishing Civil and Criminal Action. — It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under this section that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. *Hardin v. Davis*, 183 N. C. 46, 110 S. E. 602 (1922).

Three Elements of Offense.—To convict

the defendant of seduction, it is incumbent upon the State to satisfy the jury beyond a reasonable doubt of every element essential to the offense. The three elements are: (1) The innocence and virtue of the prosecutrix; (2) the promise of marriage; and (3) the carnal intercourse induced by such promise. *State v. Pace*, 159 N. C. 462, 74 S. E. 1018 (1912); *State v. Crook*, 189 N. C. 545, 127 S. E. 579 (1925); *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146 (1940); *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619 (1943). If any one of these elements is lacking there can be no seduction. *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574 (1890). See also *State v. McDade*, 208 N. C. 197, 179 S. E. 755 (1935).

Deceit is the very essence of this offence,

the warp and woof of it, so to speak. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895). The promise of marriage alone makes the seduction criminal. *State v. Whitley*, 141 N. C. 823, 53 S. E. 820 (1906). Consent is no defense. *State v. Horton*, 100 N. C. 443, 6 S. E. 238 (1888).

Meaning of "Innocent and Virtuous."—Should any woman committing the act of adultery induced by her own lascivious desires, with or without the promise, her conduct is not such as to bring her within the intent and meaning of this section as an innocent and virtuous woman. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786 (1921). See *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574 (1890). *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895).

Permitting familiarities not amounting to incontinence may be considered by the jury in determining whether the prosecutrix was virtuous. *State v. Whitley*, 141 N. C. 823, 53 S. E. 820 (1906). But when permitted by the prosecutrix after the act they do not negative evidence that she was innocent and virtuous prior thereto, though they may be properly considered by the jury with reference to the weight of her evidence. *State v. Lang*, 171 N. C. 778, 87 S. E. 957 (1916).

An adulteress may reform and become innocent and even virtuous, and the statute protects her just as much as if she had never fallen. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786 (1921).

Where there was evidence of the good reputation of prosecutrix before and at the time of the alleged illicit intercourse, it was held that this meets the requirement of this section on the element of innocence and virtue. *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619 (1943).

Promise of Marriage Must Be Unconditional.—In order for conviction under this section, the promise of marriage must be absolute and unconditional, and a promise at the time to marry the woman in the event "anything should happen to her," is insufficient for a conviction under the statute. *State v. Shatley*, 201 N. C. 83, 159 S. E. 362 (1931).

Testimony of Woman Must Be Corroborated as to Each Element.—The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This proviso has been construed to mean that the prosecutrix must be supported by independent facts and circumstances as to each element of the offense. *State v. Crook*, 189 N. C. 545, 127 S. E. 579 (1925). See also, *State v. Maness*, 192 N. C. 708, 135 S. E. 777 (1926); *State v. Forbes*, 210 N. C. 567, 187 S. E. 760 (1936);

State v. Brewington, 212 N. C. 244, 193 S. E. 24 (1937).

To convict defendant of seduction as defined in this statute the testimony of prosecutrix alone is not sufficient. There must be independent supporting evidence of each essential element of the crime. *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619 (1943).

For cases setting out facts held either sufficient or insufficient to support, see *State v. Raynor*, 145 N. C. 472, 59 S. E. 344 (1907); *State v. Maloney*, 154 N. C. 200, 69 S. E. 786 (1910); *State v. Pace*, 159 N. C. 462, 74 S. E. 1018 (1912); *State v. Cooke*, 176 N. C. 731, 97 S. E. 171 (1918); *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146 (1940).

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under this section, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be. *State v. Doss*, 188 N. C. 214, 124 S. E. 156 (1924).

Supporting Evidence Need Not Be Direct.—It is not required that the "supporting evidence" of the promise of marriage coincide with the testimony of the prosecutrix as to the time the promise was made, since it is not required that the "supporting evidence" be direct, adminicular proof being sufficient. *State v. Smith*, 217 N. C. 591, 9 S. E. (2d) 9 (1940).

Testimony supporting prosecutrix, on an indictment for seduction under this section, need not be in the form of direct evidence, for it is seldom possible to produce such proof in respect to some of the elements of the offense. Facts and circumstances tending to support her statements are sufficient. *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619 (1943).

The proviso that "the unsupported testimony of the woman shall not be sufficient to convict" is fully met where the testimony of the prosecutrix was corroborated in respect to each essential element of the offense charged; as to the promise of marriage by evidence of the prosecutrix' statements to others, and by the witness who "heard them talking," and by the further circumstance of the long and constant association of the defendant with the prosecutrix; as to her innocence and virtue by the evidence of her good character; and as to the intercourse by the admission of the defendant. *State v. Tuttle*, 207 N. C. 649, 178 S. E. 76 (1935).

Resemblance of Child to Defendant.—It is not error to permit a child to be exhibited to the jury that they may trace a resem-

blance to one charged with having begotten it; and such evidence is admissible on an indictment for seduction. *State v. Horton*, 100 N. C. 443, 6 S. E. 238 (1888).

Effect of Marriage upon Consent Judgment.—Where, in a prosecution for seduction a consent judgment is entered requiring the defendant to pay a certain sum to the prosecutrix, a subsequent marriage of the parties before the whole sum is paid does not discharge the judgment, the consent of all parties being necessary to set aside such judgment. For the defendant to get the benefit of this section the marriage must be before he is adjudged guilty. *State v. McKay*, 202 N. C. 470, 163 S. E. 586 (1932).

Indictments—No Set Form of Words.—In the trial of an indictment for seduction under this section, no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse. *State v. Maloney*, 154 N. C. 200, 69 S. E. 786 (1910).

Limitation of Action.—Deceit being the very essence of the offense of seduction, § 15-1 exempting certain crimes, including deceit, from the two years statute of limitations, applies to the offense of seduction under promise of marriage. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895).

Insufficient Evidence to Show Promise of Marriage.—In prosecution for seduction, the only evidence in support of the testimony of prosecutrix on the essential element of promise of marriage was the testimony of a witness that prosecutrix had told the witness that she and defendant were going to be married, and the further testimony that she had seen prosecutrix and defendant together over a certain period. No other witness testified that prosecutrix and defendant had been seen together. This is not sufficient to constitute proof of the promise of marriage by facts and circumstances independent of the tes-

timony of prosecutrix, and defendant's motion to nonsuit should have been granted. *State v. Forbes*, 210 N. C. 567, 187 S. E. 760 (1936).

Burden of Proof on State.—In order to convict, the burden of proof is upon the State to show beyond a reasonable doubt that the seduction was accomplished under and by means of the promise of marriage, and that the prosecutrix was at that time an innocent and virtuous woman. It must affirmatively appear that the inducing promise preceded the intercourse, and that the promise was absolute and not conditional. *State v. Wells*, 210 N. C. 738, 188 S. E. 326 (1936), holding evidence insufficient to establish that seduction was induced by previous unconditional promise of marriage.

Punishment. — This section, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895).

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence imposed. *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146 (1940).

Cited in *State v. Wade*, 197 N. C. 571, 150 S. E. 32 (1929); *State v. Hill*, 223 N. C. 711, 28 S. E. (2d) 100 (1943).

§ 14-181. Miscegenation.—All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court. (Const., art. 14, s. 8; 1834, c. 24; 1838-9, c. 24; R. C., c. 68, s. 7; Code, s. 1084; Rev., s. 3369; C. S., s. 4340.)

Editor's Note.—Under the Act of 1838-9, ch. 24, declaring void all marriages between white persons and free negroes and persons of color, all marriages between white persons and Indians were void, if within third degree, and any violation thereof was

punishable by indictment for fornication. *State v. Melton*, 44 N. C. 49 (1852).

The law has not been affected by the changes in the State or federal Constitution. See *State v. Puitt*, 94 N. C. 709 (1886).

Domicile in This State. — A marriage solemnized in a state whose laws permit such marriage between a negro and a white person domiciled in this State, and who leave it for the purpose of evading this law and with intent to return, is not valid in this State. *State v. Ross*, 76 N. C. 242 (1877); *State v. Kennedy*, 76 N. C. 251 (1877).

Domicile in Another State.—A marriage solemnized in a state whose laws permit such marriage between a negro and a white person domiciled in such state is valid in this State. *State v. Ross*, 76 N. C. 242 (1877).

§ 14-182. **Issuing license for marriage between white person and negro; performing marriage ceremony.** — If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor. (1830, c. 4, s. 2; R. C., c. 34, s. 80; Code, s. 1085; Rev., s. 3370; C. S., s. 4341.)

§ 14-183. **Bigamy.**—If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (See 9 Geo. IV, c. 31, s. 22; 1790, c. 323, P. R.; 1809, c. 783, P. R.; 1829, c. 9; R. C., c. 34, s. 15; Code, s. 988; Rev., s. 3361; 1913, c. 26; C. S., s. 4342.)

Offense against Society. — At common law and under this section bigamy is an offense against society rather than against the lawful spouse of the offender. *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769 (1941), reversed on other grounds in *Williams v. North Carolina*, 317 U. S. 287, 65 S. Ct. 207, 87 L. Ed. 279 (1942).

Constitutes a Felony. — While at common law bigamy was not an indictable offense, and even as late as the enactment of 1885, it was only a misdemeanor, it is now a felony under this statute. *State v. Burns*, 90 N. C. 707 (1884).

Necessity of Valid Marriage.—That the first marriage was celebrated without pro-

Evidence. — It was not error to admit evidence that the wife was reputed to be of mixed blood within the prohibited degrees, or to permit the witness to state his opinion on that point, although he was not an expert. It was also competent corroboration of other evidence tending to show the taint of blood to show that the wife usually associated with colored people. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1 (1892).

Cited in *Corporation Commission v. Transportation Committee*, 198 N. C. 317, 151 S. E. 648 (1930).

curement of a license, while subjecting the parties to punishment, will not so invalidate the marriage that bigamy cannot be predicated thereon. *State v. Robbins*, 28 N. C. 23 (1845).

In a trial for bigamy, an instruction that defendant could not be convicted, unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a *de facto* officer. *State v. Davis*, 109 N. C. 780, 14 S. E. 55 (1891).

The evidence showing that there were a number of eyewitnesses to the marriage,

and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid. *State v. Davis*, 109 N. C. 780, 14 S. E. 53 (1891).

Belief That First Wife Is Dead.—A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy. *State v. Goulden*, 134 N. C. 743, 47 S. E. 450 (1904).

Absence of Wife.—"The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living." *State v. Goulden*, 134 N. C. 743, 47 S. E. 450 (1904).

Admissions as to Prior Marriage.—In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage. *State v. Goulden*, 134 N. C. 743, 47 S. E. 450 (1904).

Where a defendant charged with bigamy, upon the preliminary examination before a justice of peace, and after being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the superior court, as to his guilt. *State v. Melton*, 120 N. C. 591, 26 S. E. 933 (1897).

Testimony of First Wife.—In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage. *State v. Melton*, 120 N. C. 591, 26 S. E. 933 (1897).

The record book of marriage for the county or the original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage. *State v. Melton*, 120 N. C. 591, 26 S. E. 933 (1897).

Second Marriage out of State.—It was held formerly that the courts of this State could not take jurisdiction of the case where the second marriage took place out of the State. See *State v. Barnett*, 83 N. C. 615 (1880). Subsequent to this decision a clause was inserted in the section in furtherance of a purpose to make the offense cognizable "whether the second marriage shall have taken place in the State of North Carolina, or elsewhere."

This clause, in *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261 (1892), was held unconstitutional insofar as it attempted to make a second marriage bigamous which occurred out of the State without proving that the parties afterwards cohabited in North Carolina. The constitutionality of the section was upheld in *State v. Long*, 143 N. C. 671, 57 S. E. 349 (1907), but from the statement of facts in that case it appears that while the second marriage took place in South Carolina the parties subjected themselves to the jurisdiction of this State by living here for four weeks thereafter. In *State v. Ray*, 151 N. C. 710, 66 S. E. 204 (1909), the authorities are reviewed and it is held (Clark, C. J., dissenting) that the words "or elsewhere," in the clause just quoted, were void. In recognition of these decisions the legislature, by the Public Laws of 1913, c. 26, amended the section and added the words "shall thereafter cohabit with such person in this State," which qualify and constitute a requisite to the jurisdiction when the second marriage is not in North Carolina. It has been held that this amendment is constitutional and does not confer extra-territorial jurisdiction upon the courts. See *State v. Herron*, 175 N. C. 754, 94 S. E. 698 (1917); *State v. Moon*, 178 N. C. 715, 100 S. E. 614 (1919).

This section, making bigamous cohabitation in this State a felony is valid and offends neither the federal nor State Constitutions. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744 (1944), *aff'd in Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

Same—Pleading and Proof.—If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the State, he can not move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. *State v. Mitchell*, 83 N. C. 674 (1880); *State v. Burton*, 138 N. C. 575, 50 S. E. 214 (1905); *State v. Barrington*, 141 N. C. 820, 53 S. E. 663 (1906); *State v. Long*, 143 N. C. 671, 57 S. E. 349 (1907).

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the State must prove beyond a reasonable doubt, each of the essential elements of the offense. *State v. Setzer*, 226 N. C. 216, 37 S. E. (2d) 513 (1946).

Aiding and Abetting by Marrying Outside of State.—In a prosecution upon an indictment charging defendant with aiding and abetting bigamy by entering into a

marriage with a person then married and not divorced, evidence tending to show that the bigamous marriage was contracted in another state ousts the jurisdiction of the courts and requires dismissal. *State v. Jones*, 227 N. C. 94, 40 S. E. (2d) 700 (1946).

Foreign Divorces.—Where a decree of divorce in another state, which is attacked by the prosecution for insufficient residence in such other state, is relied upon as the only defense on a trial for bigamy, the defendant must satisfy the jury, but not beyond a reasonable doubt, of the bona fides of his residence in the other state. *State v. Herron*, 175 N. C. 754, 94 S. E. 698 (1917).

A man and a woman went from this State to Nevada and, after residing there for a time sufficient to meet the requirement of a Nevada statute, secured decrees from a Nevada court, divorcing them from their respective spouses, in this State, in which they had been married and domiciled. They then married each other in Nevada, returned to this State and cohabited there as man and wife. Prosecuted under this section for bigamous cohabitation, they set up in defense the Nevada decrees. A general verdict was returned, after instructions permitting that the decrees be disregarded upon either of two grounds, (1) that a Nevada divorce decree based on substituted service, where defendant made no appearance, could not be recognized in this State, and (2) that defendants went to Nevada, not to establish bona fide residence, but solely for the purpose of taking advantage of the laws of that state to obtain a divorce through a fraud upon the Nevada court. It was held that, as it could not be determined on the record that the verdict was not based solely upon the first ground—involving a construction and application of the federal Constitution—the review in the Supreme Court of the United States must be of that ground, leaving the other out of consideration. *Williams v. North Carolina*, 217 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942), reversing *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as prima facie valid, they are not conclusive; and, when challenged in a prosecution under this section for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired bona fide domiciles in the state granting their divorces and that such

divorces are valid. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744 (1944), aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

A man and a woman, domiciled in North Carolina, left their spouses in North Carolina, obtained decrees of divorce in Nevada, married and returned to North Carolina to live. Prosecuted in North Carolina for bigamous cohabitation, they pleaded the Nevada divorce decrees in defense but were convicted. The court held that, upon the record, the judgements of conviction were not invalid as denying the Nevada divorce decrees the full faith and credit required by Art. IV, § 1 of the Constitution. *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945), aff. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744 (1944).

Proof of a divorce granted in another state, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions. *State v. Herron*, 175 N. C. 754, 94 S. E. 698 (1917).

The Indictment.—An indictment for bigamy which charges that defendant “wilfully, unlawfully and feloniously, being a married man, did marry one W. during the life of his first wife,” sufficiently avers the first marriage. *State v. Davis*, 109 N. C. 780, 14 S. E. 55 (1891).

Same—Name of First Wife.—It is not necessary, in an indictment for bigamy, to set out the name of the first wife. *State v. Davis*, 109 N. C. 780, 14 S. E. 55 (1891).

Same — Negating Divorce Unnecessary.—It was not necessary that an indictment for bigamy should contain an averment that the defendant had not been divorced from his wife. *State v. Norman*, 13 N. C. 222 (1828); *State v. Davis*, 109 N. C. 780, 14 S. E. 55 (1891); *State v. Melton*, 120 N. C. 591, 26 S. E. 933 (1897).

Same—Time and Place of Marriage.—This section does not by its language make it necessary for the indictment to state the dates of the marriages, and § 15-155 expressly enacts that such a statement shall not be necessary. *State v. Long*, 143 N. C. 671, 57 S. E. 349 (1907).

Under this section it is unnecessary to state where the second marriage took place, and it is not necessary that the offense should be committed in the county where the bill is found to confer jurisdiction. *State v. Long*, 143 N. C. 671, 57 S. E. 349 (1907).

Bill of Particulars.—As in other offenses a bill of particulars is necessary if the de-

fendant desires further information upon which to prepare his defense. *State v. Long*, 143 N. C. 671, 57 S. E. 349 (1907).

Venue.—Defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place. *State v. Williams*, 220 N. C. 445, 17 S. E. (2d) 769 (1941), reversed on other grounds in *Williams v. North Carolina*, 217 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744 (1944), aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

Plea of Former Jeopardy Properly Overruled.—Where, in a criminal prosecution for bigamous cohabitation, there is a conviction and judgment chiefly on the grounds of insufficient service, which on

appeal is affirmed by the Supreme Court and reversed by the Supreme Court of the United States and remanded, upon the second trial on the issue of domicile only, the plea of former jeopardy and motion to dismiss were properly overruled. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744 (1944), aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

Prima Facie Case Made Out.—Upon issues of traverse on indictment for bigamous cohabitation, the prosecution offering evidence tending to show that defendants had been previously married, that their respective spouses were still living, that defendants had undertaken to contract a marriage in another state and thereafter had cohabited with each other in this State, a prima facie case is made out and a demurrer to the evidence was properly overruled. *State v. Williams*, 224 N. C. 183, 29 S. E. (2d) 744 (1944), aff'd in *Williams v. State*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945).

§ 14-184. Fornication and adultery.—If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. (1805, c. 684, P. R.; R. C., c. 34, s. 45; Code, s. 1041; Rev., s. 3350; C. S., s. 4343.)

For history of section, see *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

General Consideration.—Adultery is an aggravated species of fornication. *State v. Crowell*, 26 N. C. 231 (1844). Fornication occurs upon cohabitation after miscegenation. See § 14-181 and notes thereto.

Offense Is Statutory.—The offense of fornication and adultery is statutory. *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346 (1949).

"Lewdly and lasciviously cohabit" implies habitual intercourse in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136 (1945); *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346 (1949).

Warrant or Indictment.—The warrant or indictment must set forth the essential elements of the offense of fornication and adultery. *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346 (1949).

A warrant charging that defendant did lewdly and lasciviously associate with a woman to whom he was not married and "did engage in an act of intercourse" with her, fails to charge the statutory offense of fornication and adultery, and judgment against defendant was arrested by the Supreme Court *ex mero motu*. *State v. Ivey*, 230 N. C. 172, 52 S. E. (2d) 346 (1949).

The use of the word "adulterously" dispenses with the necessity of alleging that the parties were not married (*State v. McDuffie*, 107 N. C. 885, 12 S. E. 83 (1890)) and were of different sex. *State v. Britt*, 150 N. C. 811, 62 S. E. 1056 (1909). The words "lewdly and lasciviously" need not be used. *Id.* The State is not called upon to allege or prove the criminal intent. *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107 (1891). The fact that the female is erroneously alleged to be a "spinster" is not ground of arrest of judgment. *State v. Guest*, 100 N. C. 410, 6 S. E. 253 (1888).

The admissions or confessions of one party are not to be received against the codefendant. *State v. Rhinehart*, 106 N. C. 787, 11 S. E. 512 (1890). However, it has been held that under certain circum-

stances such declarations are admissible when made by the female defendant in the presence of the male. See *State v. Roberts*, 188 N. C. 460, 124 S. E. 833 (1924).

But the proviso in this section relates to extra-judicial declarations, and does not prevent a woman jointly charged with the offense from testifying as a witness at the trial of her paramour to facts, otherwise competent, which are within her personal knowledge, where at the time she testifies her plea of *nolo contendere* has been accepted by the State, and she is no longer on trial. The prohibition of the proviso is directed not to the person testifying but against the use in evidence of such person's previous admissions or confessions. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948), discussed in 27 N. C. Law Rev. 365.

Corroboration of Paramour.—Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the facts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

It is competent to prove that either defendant had a living spouse. *State v. Manly*, 95 N. C. 661 (1886).

Statements and conduct prior to the offense charged are admissible, *State v. Austin*, 108 N. C. 780, 13 S. E. 219 (1891), as is also testimony as to conduct of the parties after indictment. *State v. Stubbs*, 108 N. C. 774, 13 S. E. 90 (1891).

Testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

Improper Advances Made by Defendant to Another Woman.—Where defendant was charged with fornication and adultery with one of the orphanage girls under his supervision, testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the State's case. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

Circumstantial Evidence.—The guilt of defendants or of a defendant, in a prosecution for fornication and adultery, must be established in almost every case by cir-

cumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136 (1945).

Acquittal as to One Party.—Where only one party is convicted and the other acquitted, there can be no judgment against the one convicted. *State v. Mainor*, 28 N. C. 340 (1846). This holding was followed in the case of *State v. Lyerly*, 52 N. C. 158 (1859), and was held as law in this State until doubted in *State v. Rhinehart*, 106 N. C. 787, 11 S. E. 512 (1890). The question came before the court again in *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107 (1891), when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This seems to be the present status of the law on this point. It was followed in *State v. Simpson*, 133 N. C. 676, 45 S. E. 567 (1903).

Both defendants need not be convicted of mutual intent to violate the law before conviction of one of them can be sustained. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136 (1945).

Both Convicted—New Trial as to One.—If both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other. *State v. Parham*, 50 N. C. 416 (1858).

Proper Instruction.—In a prosecution for fornication and adultery, an instruction that if the jury found beyond a reasonable doubt that defendant and his alleged paramour, not being married to each other, engaged in sexual intercourse with each other, with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return a verdict of guilty, is without error. *State v. Davis*, 229 N. C. 386, 50 S. E. (2d) 37 (1948).

Evidence Held Sufficient to Support Conviction.—On a prosecution upon indictment charging fornication and adultery, where the State's evidence tended to show that defendants were constantly together, day and night, on the streets and in several different homes maintained by the male defendant, and that they were arrested late at night in one of these homes, no other person being in the house at the time, both defendants coming out of the same bedroom, there was sufficient evidence to support a conviction. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136 (1945).

Punishment.—Persons convicted of fornication and adultery may be impris-

enced in the common jail for a period to be fixed in the discretion of the court. *State v. Manly*, 95 N. C. 661 (1886), citing *State v. McNeal*, 75 N. C. 15 (1876); *State v. Jackson*, 82 N. C. 565 (1880).

The court has power, during the term, to correct or modify an unexecuted judg-

ment in a criminal as well as in civil actions. *State v. Manly*, 95 N. C. 661 (1886). See also, *In re Brittain*, 93 N. C. 587 (1885).

Applied in *State v. Miller*, 214 N. C. 317, 199 S. E. 89 (1938).

§ 14-185. Inducing female persons to enter hotels or boarding-houses for immoral purposes.—Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter a hotel, public inn or boardinghouse for the purpose of prostitution or debauchery or for any other immoral purpose, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 1; C. S., s. 4344.)

§ 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.—Any man and woman found occupying the same bedroom in any hotel, public inn or boardinghouse for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boardinghouse, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court. (1917, c. 158, s. 2; C. S., s. 4345.)

§ 14-187. Permitting unmarried female under eighteen in house of prostitution.—Whoever, being the keeper of a house of prostitution, or assignation house, building or premises in this State where prostitution, fornication or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building or premises, shall be guilty of a misdemeanor. (Pub. Loc., 1913, c. 761, s. 18; 1919, c. 288; C. S., s. 4346.)

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.—On a prosecution in any court for keeping a disorderly house or bawdy-house, or permitting a house to be used as a bawdy-house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy-house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy-house is also "keeper" thereof. (1907, c. 779; C. S., s. 4347.)

Constitutionality.—This section is constitutional. *State v. Price*, 175 N. C. 804, 95 S. E. 478 (1918).

Disorderly House Defined — Illustrations.—A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. *State v. Wilson*, 93 N. C. 608 (1885).

The following have been held to constitute disorderly houses: A shop in which disorderly crowds assemble. *State v. Robertson*, 86 N. C. 628 (1882). A store

in which persons collect and disturb the neighborhood. *State v. Thornton*, 44 N. C. 252 (1853).

The following have been held not to constitute disorderly houses: A private dwelling wherein an uproar was frequently raised but which disturbed few people. *State v. Wright*, 51 N. C. 25 (1859). The residence of an unchaste woman. *State v. Evans*, 27 N. C. 603 (1845).

Persons Leasing Premises as a "Keeper."—A person who leases a house knowing that it is to be used for disorderly and un-

lawful purposes is treated as a direct offender. *State v. Boyd*, 175 N. C. 791, 95 S. E. 161 (1918).

Powers of City Authorities.—The extent of the powers of the authorities of a municipality to enact ordinances concerning houses of ill-fame is discussed in *State v. Webber*, 107 N. C. 962, 12 S. E. 598 (1890).

§ 14-189. Obscene literature.—It shall be unlawful for any person, firm or corporation to exhibit for the purpose of gain, or display for sale, lend or hire, or otherwise publish or sell for the purpose of gain, or exhibit in any school, college, or other institution of learning, or have in his possession for the purpose of sale or distribution, any obscene literature, as determined and defined in the postal laws and regulations of the United States Post Office Department, in the form of book, paper-writing, print, drawing, or other representation, at any newsstand, book store, drug store or other public or private places; or if any person shall post any indecent placards, writings, pictures or drawings on walls, fences, billboards or other public or private places, he shall be guilty of a misdemeanor. (1885, c. 125; Rev., s. 3731; 1907, c. 502; C. S., s. 4348; 1935, c. 57.)

Editor's Note. — The 1935 amendment made many changes in this section, which formerly also covered the offense of indecent exposure. This is now the subject of § 14-190.

Test of Immorality.—It has been suggested that the test of immorality is whether the literature "has a tendency to shock the moral sense of the average, nor-

Evidence.—This section authorizes the admission of evidence tending to show the lewd, dissolute, and boisterous conversation of the inmates and frequenters of the house, and especially provides that evidence of the general reputation or character of the house shall be admissible and competent. *State v. Hilderbran*, 201 N. C. 780, 161 S. E. 488 (1931).

mal head of a family." If such a test would prevent the publication of writings of an educational value on sex hygiene, commercialized vice and the like, the remedy would be a matter for the legislature, since the Constitution only prevents restrictions upon, and not enlargement of, the right to publish. 4 N. C. Law Rev. 33.

§ 14-190. Indecent exposure; immoral shows, etc.—Any person who in any place willfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so as to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor. Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place or highway shall be guilty of a misdemeanor. (1885, c. 125; Rev., s. 3731; 1907, c. 502; C. S., s. 4348(a); 1935, c. 57; 1941, c. 273.)

Editor's Note. — The 1941 amendment added the last sentence to this section. For comment on the amendment, see 19 N. C. Law Rev. 479.

§ 14-191. Sheriffs and deputies to report violations of two preceding sections.—It shall be the duty of the sheriffs and their deputies of the various counties to see that the provisions of §§ 14-189 and 14-190 are enforced by reporting violations of said sections to the presiding judge of a superior court, county or municipal court, or justice of the peace, who shall have warrants issued to cause such violators to come before their courts for immediate trial. (1935, c. 57.)

Editor's Note.—The case treated under this section was decided under § 14-189 as it read prior to the 1935 amendment. Prior to the enactment of this section there was no provision for the enforcement of § 14-189.

Powers of Officers.—Under § 14-189 it was held that the chief of police and his lawful officers or subordinates had the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public were invited and, in the proper discharge

of these duties, they could act immediately whenever such exhibitions were taking place in their presence or were imminent and their interference was required to prevent them. *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629 (1913).

§ 14-192. Cutting or painting obscene words or pictures near public places.—It shall be unlawful for any person to write, cut or carve any indecent word, or to paint, cut or carve any obscene or lewd picture or representation, on any tree or other object near the public highways or other public places. Any person guilty of violating this section shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (1907, c. 344; C. S., s. 4349.)

§ 14-193. Exhibition of obscene or immoral pictures; posting of advertisements.—If any person, firm, or corporation shall, for the purpose of gain or otherwise, exhibit any obscene or immoral motion pictures; or if any person, firm or corporation shall post any obscene or immoral placard, writings, pictures, or drawings on walls, fences, billboards, or other places, advertising theatrical exhibitions or moving picture exhibitions or shows; or if any person, firm, or corporation shall permit such obscene or immoral exhibitions to be conducted in any tent, booth, or other place or building owned or controlled by said person, firm, or corporation, the person, firm, or corporation performing either one or all of the said acts shall be guilty of a misdemeanor, and punishable in the discretion of the court. For the purpose of enforcing this statute any spectator, at the exhibition of an obscene or immoral moving picture may make the necessary affidavit upon which the warrant for said offense is issued. (1921, c. 212; C. S., s. 4349(a).)

§ 14-194. Circulating publications barred from the mails.—It shall be unlawful for any news agent, news dealer, book-seller, or any other person, firm, or corporation to offer for sale, sell, or cause to be circulated within the State of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

It shall be unlawful for any person, firm, or corporation to offer for sale, sell, or give to any person under the age of twenty-one years any such magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

This section shall not be construed to in any way conflict with or abridge the freedom of the press, and shall in no way affect any publication which is permitted to be sent through the United States mails.

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. (Ex. Sess. 1924, c. 45.)

Editor's Note.—A practical criticism of the effect of this section upon the freedom of the press will be found in 4 N. C. Law

Rev. 35. See also the review in 3 N. C. Law Rev. 26.

§ 14-195. Using profane or indecent language on passenger trains.—It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars or imprisoned not more than thirty days. (1907, c. 470, ss. 1, 2; C. S., s. 4350.)

§ 14-196. Using profane or indecent language to female telephone operators.—It shall be unlawful for any person to use any lewd or profane words, or any words of vulgarity, or to use indecent language to any female telephone operator operating any telephone, switchboard, circuit or line. Any person violating this section shall upon conviction be guilty of a misdemeanor. (1913, c. 35; 1915, c. 41; C. S., s. 4351.)

§ 14-196.1. Using profane, vulgar or indecent language to female over telephone.—It shall be unlawful for any person to use any lewd or profane language or words of any vulgarity or indecency over the telephone to any female person. Any person violating this section shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned in the discretion of the court. (1951, c. 127.)

§ 14-197. Using profane or indecent language on public highways, counties exempt.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempt from the provisions of this section: Brunswick, Camden, Cleveland, Craven, Dare, Macon, Martin, Pasquotank, Pitt, Stanly, Swain, Tyrrell and Washington. (1913, c. 40; C. S., s. 4352; Pub. Loc. Ex. Sess. 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845.)

Editor's Note. — The 1933 amendment struck out Transylvania, the 1947 amendments struck out Beaufort and Orange and the 1949 amendment struck out Watuga.

§ 14-198. Lewd women within three miles of colleges and boarding schools.—If any loose woman or woman of ill-fame shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months. (1889, c. 523; Rev., s. 3353; C. S., s. 4353.)

§ 14-199. Obstructing way to places of public worship.—If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor. (1785, c. 241, P. R.; R. C., c. 97, s. 5; Code, s. 3669; Rev., s. 3776; C. S., s. 4354; 1945, c. 635.)

Cross References.—As to procedure for laying out church roads, see § 136-71. As to obstruction of such highway, see § 136-90 and annotations thereto.

Editor's Note. — The 1945 amendment

struck out the words "and shall be fined not more than fifty dollars or imprisoned not more than thirty days" formerly appearing at the end of this section.

§ 14-200. Disturbing religious assembly by certain exhibitions.—If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exhibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there exhibit them, he shall forfeit and pay to any one who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. (1809, c. 779, s. 1, P. R.; R. C., c. 97, s. 6; Code, s. 3670; Rev., s. 3705; 1907, c. 412; C. S., s. 4355.)

Local Modification. — Dare, Hatteras township: C. S. 4355.

§ 14-201. Permitting stone-horses and stone-mules to run at large.—If any person shall let any stone-horse or stone-mule of two years old or up-

wards run at large, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (R. C., c. 17, s. 6; Code, s. 2325; Rev., s. 3323; 1907, c. 412; C. S., s. 4356.)

Local Modification. — Dare, Hatteras township: C. S. 4356.

§ 14-202. Secretly peeping into room occupied by woman.—Any person who shall peep secretly into any room occupied by a woman shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 78; C. S., s. 4356(a).)

Editor's Note.—It was suggested in 1 N. C. Law Rev. 286 that although this law is made to apply generally to all persons, it is believed that it will not interfere with police officers or detectives who may be compelled to violate the letter of the law to get evidence.

Evidence in prosecution of defendant

for peeping secretly into a room occupied by a woman, was held sufficient to be submitted to the jury where a witness for the State testified that the room was usually occupied by a woman and he saw someone in the room immediately after defendant left the window. *State v. Peterson*, 232 N. C. 332, 59 S. E. (2d) 635 (1950).

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.—The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term "assignation" shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement. (1919, c. 215, s. 2; C. S., s. 4357.)

Quoted in *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358 (1942).

155 S. E. 927 (1930); *State v. Harrill*, 224 N. C. 477, 31 S. E. (2d) 353 (1944).

Cited in *State v. Fletcher*, 199 N. C. 815,

§ 14-204. Prostitution and various acts abetting prostitution unlawful.—It shall be unlawful:

1. To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

2. To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

3. To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

4. To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

5. To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

6. To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever. (1919, c. 215, s. 1; C. S., s. 4358.)

Cross Reference. — As to declaring houses of prostitution to be nuisances, see § 19-1.

Transporting. — Where defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his

taxi with motor running, and carrying soldiers, the evidence of the character of the scene and the other circumstantial evidence was sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution. *State v. Willis*, 220 N. C. 712, 18 S. E. (2d) 118 (1942).

Aiding and Abetting.—A warrant alleging that defendant on a particular day in the designated county “did unlawfully, and willfully aid and abet in the prostitution and assignation contrary to the form of the statute and against the peace and dignity of the State” follows the language of subsection 7 of this section, and is sufficient to charge the offense therein proscribed. *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358 (1942).

Competency of Evidence.—Evidence of

the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. *State v. Waggoner*, 207 N. C. 306, 176 S. E. 566 (1934).

Sufficiency of Evidence.—In a criminal prosecution for permitting property to be used for prostitution where the State’s evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant’s wife was one of the operators of the place of ill-fame and that its general reputation was bad, motion for judgment as of nonsuit was held properly denied. *State v. Herndon*, 223 N. C. 208, 25 S. E. (2d) 611 (1943).

Cited in *State v. Fletcher*, 199 N. C. 815, 155 S. E. 927 (1930).

§ 14-205. Prosecution: in what courts.—Prosecutions for the violation of any of the provisions of this article shall be tried in the courts of this State wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the Constitution of this State that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6; C. S., s. 4359.)

§ 14-206. Reputation and prior conviction admissible as evidence.—In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3; C. S., s. 4360.)

Stated in *State v. Harrill*, 224 N. C. 477, 31 S. E. (2d) 353 (1944).

§ 14-207. Degrees of guilt.—Any person who shall be found to have committed two or more violations of any of the provisions of § 14-204 of this article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4; C. S., s. 4361.)

Province of Judge.—When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to

or include the finding by the judge of the degree of the offender’s guilt. *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381 (1898); *State v. Lee*, 192 N. C. 225, 134 S. E. 458 (1926); *State v. Brinkley*, 193 N. C. 747, 138 S. E. 138 (1927).

§ 14-208. Punishment; probation; parole.—Any person who shall be deemed guilty in the first degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court, or may be committed to any penal or reformatory institution in this State: Provided, that in case of a commitment to a reformatory institution, the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to

require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Any person who shall be deemed guilty in the second degree, as set forth in § 14-207, shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this article shall be placed on probation or on parole in the care or charge of any person except a woman probation officer. (1919, c. 215, s. 5; C. S., s. 4362; 1921, c. 101.)

Admission of Guilt — Effect on Time Limitation. — A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground

that the offense charged in the indictment did not come within the period of time prescribed by the statute. *State v. Brinkley*, 193 N. C. 747, 138 S. E. 138 (1927).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. **Punishment for perjury.**—If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or State's prison not less than four months nor more than ten years. (1791, c. 338, s. 1, P. R.; R. C., c. 34, s. 49; Code, s. 1092; Rev., s. 3615; C. S., s. 4364.)

Cross References.—As to form of bill for perjury, see § 15-145. As to false swearing by creditor in assignment for benefit of creditors, see § 23-9. As to swearing falsely in connection with an election, see § 163-197. As to false swearing in an investigation before the Insurance Commissioner, see § 69-3. As to false swearing in an investigation of trusts and combinations in restraint of trade, see § 75-12. As to making false affidavits in applications for motor vehicle licenses, see § 20-31. As to perjury in application for oyster license, see § 113-203. As to stevedore's false oath, see § 44-25. As to swearing falsely to official reports, see § 14-232.

Definition of Perjury.—Perjury, as defined by common law and enlarged by this section, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein

the affiant is required by law to be sworn, as to some matter material to the issue or point in question. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348 (1949).

Essential Elements. — The administration of an oath is an essential element of perjury. *State v. Glisson*, 93 N. C. 506 (1885). Another is jurisdiction of the court. *State v. Wyatt*, 3 N. C. 56 (1798); *Bolling v. Luther*, 4 N. C. 635 (1817); *State v. Alexander*, 11 N. C. 182 (1825). The false testimony given must be material. *State v. Cline*, 146 N. C. 640, 61 S. E. 522 (1908).

This section does not specifically define perjury or state all the elements essential to constitute the crime. It enlarges the scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348 (1949).

False Statement Must Be Material to

Issue.—A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348 (1949).

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In a subsequent prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that he was the father of the child. It was held that the proof of false testimony did not relate to matters determinative of the issue in the first prosecution, and the evidence was insufficient to withstand nonsuit in the prosecution for perjury. *State v. Smith*, 230 N. C. 198, 52 S. E. (2d) 348 (1949).

Irregularity of Warrant Immaterial.—When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890).

Burden of Proof on State.—The burden is not on the defendant in perjury to show

the truth of the matter at issue, but the burden is on the State to show that it is false. *State v. Cline*, 150 N. C. 854, 64 S. E. 591 (1909).

Sufficient Evidence.—To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890).

The direct oath of one witness and proof of declarations of the prisoner in an action for perjury are sufficient to convict. *State v. Molier*, 12 N. C. 263 (1827).

Where the defendant swears to an answer in a civil action before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of this section it must be shown that he "willfully and corruptly" committed the offense. *State v. Dowd*, 201 N. C. 714, 161 S. E. 205 (1931).

Formerly Called Misdemeanor. — The former provision in this section that the offense was a misdemeanor did not make it so for the punishment was felony punishment, and the offense was treated as a felony. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284 (1913).

The Indictment. — See § 15-145 and notes thereto.

Cited in *Grudger v. Penland*, 108 N. C. 593, 13 S. E. 168 (1891).

§ 14-210. Subornation of perjury.—If any person shall, by any means, procure another person to commit such willful and corrupt perjury as is mentioned in § 14-209, the person so offending shall be punished in like manner as the person committing the perjury. (1791, c. 338, s. 2, P. R.; R. C., c. 34, s. 50; Code, s. 1093; Rev., s. 3616; C. S., s. 4365.)

Cross Reference.—As to bill for subornation of perjury, see § 15-146.

The suborner of perjury and the perjuror stand on an equal footing, especially

in respect of turpitude and punishment. *State v. Cannon*, 227 N. C. 338, 42 S. E. (2d) 344 (1947).

§ 14-211. Perjury before legislative committees.—If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee of either house of the General Assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the superior court of Wake County, shall be confined in the State's prison for the time prescribed by law for perjury. (1869-70, c. 5, s. 4; Code, s. 2857; Rev., s. 3611; C. S., s. 4366.)

§ 14-212. Perjury in court-martial proceedings.—If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be

liable to the pains and penalties of perjury. (1812, c. 828, s. 3, P. R.; R. C., c. 70, s. 73; Code, s. 3235; Rev., s. 3612; C. S., s. 4367.)

§ 14-213. **False oath to statement of insurance company.**—Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (1899, c. 54, s. 97; Rev., s. 3493; C. S., s. 4368.)

§ 14-214. **False oath to procure benefit of insurance policy or certificate.**—Any person who shall willfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon a contract of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such claim, shall be punishable by imprisonment for not more than five years or by a fine of not more than five hundred (\$500.00) dollars, or by both such fine or imprisonment within the discretion of the court. (1899, c. 54, s. 60; Rev., s. 3487; 1913, c. 89, s. 28; C. S., s. 4369; 1937, c. 248.)

Burden on the State.—The gravamen of the offense defined by this section is the willfully and knowingly presenting a false or fraudulent proof of claim for a loss upon a contract of insurance; and in the prosecution thereunder the burden is upon the State to prove that the claim for loss was false, that defendant knew it was

false, and that, with such knowledge, he proceeded to make the claim for payment of insurance thereon. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819 (1940).

Cited in *Meekins v. Aetna Ins. Co.*, 231 N. C. 452, 57 S. E. (2d) 777, 15 A. L. R. (2d) 949 (1950).

§ 14-215. **False oath to statement required of fraternal benefit societies.**—Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury. (1913, c. 89, s. 28; C. S., s. 4370.)

Cross Reference. — See also, § 58-302.

§ 14-216. **False oath to certificate of mutual fire insurance company.**—Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within thirty days after granting a license to such company, shall be guilty of perjury. (1899, c. 54, s. 32; 1901, c. 391, ss. 3, 4; 1903, c. 438, s. 4; Rev., ss. 4738, 4834; C. S., s. 4371.)

Cross Reference. — As to the oaths required of officers of a mutual fire insurance company, see § 58-92.

ARTICLE 29.

Bribery.

§ 14-217. **Bribery of officials.**—If any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and shall be punished by imprisonment in the State's prison for a term not exceeding five years, or fined not exceeding five thousand

dollars, or both, in the discretion of the court. (1868-9, c. 176, s. 2; Code, s. 991; Rev., s. 3568; C. S., s. 4372.)

Cross References. — As to bank examiners accepting bribes, see § 14-233. As to bribing agents and servants to violate duties owed employers, see § 14-353. As to bribery of baseball players, umpires, and officials, see § 14-373 et seq. As to when costs of prosecuting charges of bribery shall be paid by the State, see § 6-16.

"The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office." *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50 (1890).

Sufficiency of Indictment. — An allega-

tion in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to receive" such compensation, is sufficient and is not defective because of the use of "and" instead of "or" as used in the statute. *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216 (1896).

Necessity of Proving Corrupt Intent.—

On the trial of an officer for bribery in taking unlawful fees, it is necessary to prove a corrupt intent. *State v. Pritchard*, 107 N. C. 921, 12 S. E. 50 (1890).

Applied in *State v. Cofer*, 205 N. C. 652, 172 S. E. 176 (1934).

§ 14-218. **Offering bribes.**—If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony, and shall be punished by imprisonment for a term not less than one year nor more than five years in the State's prison or county jail, in the discretion of the court. (1870-1, c. 232; Code, s. 992; Rev., s. 3569; C. S., s. 4373.)

Not Necessary That Bribed Juror Received Fee.—In a prosecution under this section it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery

and an offer to bribe. *State v. Noland*, 204 N. C. 329, 168 S. E. 412 (1933). As to venue, see note to § 15-134.

Cited in *State v. Barkley*, 198 N. C. 349, 151 S. E. 733 (1930).

§ 14-219. **Bribery of legislators.**—If any person shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given, any money, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the Senate or House of Representatives of this State after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending before the General Assembly, or which may come before him for action in his capacity as a member of the General Assembly, such person so offering, promising or giving, or causing or procuring to be promised, offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the State's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the General Assembly and shall be forever disqualified to hold any office of honor, trust or profit under this State. (1868-9, c. 176, s. 5; Code, s. 2852; Rev., s. 3570; C. S., s. 4374.)

§ 14-220. **Bribery of jurors.**—If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a State prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by

his verdict, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. (5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12; R. C., c. 34, s. 34; Code, s. 990; Rev., s. 3697; C. S., s. 4375.)

ARTICLE 30.

Obstructing Justice.

§ 14-221. Breaking or entering jails with intent to injure prisoners.—If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the State's prison or the county jail not less than two nor more than fifteen years. (1893, c. 461, s. 1; Rev., s. 3698; C. S., s. 4376.)

Cross References.—As to cost of investigating lynchings, see § 6-43. As to sheriff's duty to protect prisoner, see § 162-23. As to investigation of lynchings, see § 15-98 and § 114-15. As to venue, see § 15-128.

Conviction of Attempt.—On an indictment under this section as construed with §§ 15-128 and 15-170, the defendant may be found guilty of an attempt. *State v. Rumble*, 178 N. C. 717, 100 S. E. 622 (1919).

Indictment Need Not Charge Accessories.—It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others"

to commit the crime of lynching, because it did not name the others or charge that they were unknown. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906). As to effect of splitting act of 1893, see note of this case under § 6-43.

Indictment in Adjoining County.—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. See § 15-128. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906).

§ 14-222. Refusal of witness to appear or to testify in investigations of lynchings.—If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court. (1893, c. 461, s. 3; Rev., s. 3699; C. S., s. 4377.)

Cross Reference.—As to privilege of witnesses, see § 15-99.

§ 14-223. Resisting officers.—If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor. (1889, c. 51, s. 1; Rev., s. 3700; C. S., s. 4378.)

Cross References.—As to powers and duties of constable, see §§ 151-7 and 160-18. As to criminal authority of policemen, see § 160-21. As to arrest in general, see § 15-39 et seq.

Indictment in Two Counts.—An indictment having two counts, one against one person under this section, and the other against several persons under § 14-224, is

defective, but if not objected to before a verdict which convicts on one count and acquits on the other, is not sufficient grounds for arrest of judgment, as the acquittal is equivalent to a nol. pros. *State v. Perdue*, 107 N. C. 853, 12 S. E. 253 (1890).

Quashing Indictment if Sufficient to Convict of Assault.—Where an indictment

for resisting an officer is defective, as such it ought not to be quashed if the defendant may be convicted thereon for a simple assault. *State v. Dunn*, 109 N. C. 839, 13 S. E. 881 (1891).

Process Must Be Legal.—A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. *State v. Curtis*, 2 N. C. 471 (1797).

Authority of Officer and Notice to Party.—"If the officer has no authority to make the arrest, or having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person." *State v. Kirby*, 24 N. C. 201 (1842); *State v. Bryant*, 65 N. C. 327 (1871); *State v. Belk*, 76 N. C. 10 (1877).

In a prosecution for resisting arrest under this section, a defense that the arrest was made by a constable outside of his township and that therefore defendant did not resist an officer in the performance of his duty is unavailing in view of § 151-7,

§ 14-224. Failing to aid police officers.—If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor. (1889, c. 51, s. 2; Rev., s. 3701; C. S., s. 4379.)

See note "Indictment in Two Counts" under preceding section.

Guilt or Name of Party Arrested Immaterial.—The guilt or innocence of the party charged, or the false evidence on which the warrant was based, does not impair the officer's authority. *Meeds v. Carver*, 30 N. C. 298 (1848); *State v. James*, 80 N. C. 370 (1879).

§ 14-225. False, etc., reports to police radio broadcasting stations.—Any person who shall willfully make or cause to be made to a police radio broadcasting station any false, misleading or unfounded report, for the purpose of interfering with the operation thereof, or to hinder or obstruct any peace officer in the performance of his duty, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one year or by a fine of not more than five hundred dollars (\$500.00), or by both such fine and imprisonment, in the discretion of the court. (1941, c. 363.)

Editor's Note. — For comment on this enactment, see 19 N. C. Law Rev. 477.

§ 14-226. Intimidating or interfering with jurors and witnesses. — If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall

and Art. IV, § 24 of the Constitution, a constable having authority to make an arrest anywhere in the county within which he is appointed. *State v. Corpening*, 207 N. C. 805, 178 S. E. 564 (1935).

Collector of Back Tax. — See *State v. Alston*, 127 N. C. 518, 37 S. E. 137 (1900).

Preventing Road Overseer Cutting Ditch. — See *State v. New*, 130 N. C. 731, 41 S. E. 1033 (1902).

Resisting Second Service of Warrant. — Defendant is not liable for assault and battery for resisting an entry into her house by an officer armed with a warrant which had once been served and returned, though defendant had entered into a recognition and failed to appear. *State v. Queen*, 66 N. C. 615 (1872).

Persons Aiding and Abetting. — See *State v. Morris*, 10 N. C. 388 (1824).

Cited in *State v. McClure*, 166 N. C. 321, 81 S. E. 458 (1914); *State v. Scoggins*, 199 N. C. 821, 155 S. E. 927 (1930); *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938); *State v. Wray*, 217 N. C. 167, 7 S. E. (2d) 468 (1940).

To the person summoned by a lawful officer to come to his aid in making an arrest it is absolutely immaterial and irrelevant what is the name of the party to be arrested or the nature of the offense. *State v. Ditmore*, 177 N. C. 592, 99 S. E. 368 (1919).

Stated in *Tomlinson v. Norwood*, 208 N. C. 716, 182 S. E. 659 (1935).

be fined or imprisoned in the discretion of the court. (1891, c. 87; Rev., s. 3696; C. S., s. 4380.)

In General.—This section is additional to and not a repeal of the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and crimi-

nal cases. In re Young, 137 N. C. 552, 50 S. E. 220 (1905).

Cited in State v. Hodge, 142 N. C. 665, 55 S. E. 626 (1906).

§ 14-227. Failing to attend as witness before legislative committees.—If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the General Assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be subject to imprisonment at the discretion of the court. (1869-70, c. 5, s. 2; Code, s. 2854; Rev., s. 3692; C. S., s. 4381.)

ARTICLE 31.

Misconduct in Public Office.

§ 14-228. Buying and selling offices.—If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office, or any part thereof, shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court. (5, 6 Edw. VI, c. 16, ss. 1, 5; R. C., c. 34, s. 33; Code, s. 998; Rev., s. 3571; C. S., s. 4382.)

Cross References.—As to sheriff letting to farm his office, see § 162-24. As to validity of bargain to sell an office, see § 128-3.

§ 14-229. Acting as officer before qualifying as such.—If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office. (Code, s. 79; Rev., s. 3565; C. S., s. 4383.)

§ 14-230. Willfully failing to discharge duties.—If any clerk of any court of record, sheriff, justice of the peace, recorder, prosecuting attorney of any recorder's court, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence

of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (1901, c. 270, s. 2; Rev., s. 3592; C. S., s. 4384; 1943, c. 347.)

Cross References. — As to failure of county commissioners to perform duty, see § 153-15. As to failure of sheriff to make return, see § 14-242. As to prosecution of officers failing to discharge duties, see § 128-16 et seq.

Editor's Note. — The 1943 amendment made this section applicable to recorders and prosecuting attorneys of recorder's courts.

In General.—"The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. *State v. Commissioners*, 4 N. C. 419 (1816); *State v. Williams*, 34 N. C. 172 (1851); *State v. Com'rs*, 48 N. C. 399 (1856); *State v. Fergusson*, 76 N. C. 197 (1877). If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office." *State ex rel. Battle v. Rocky Mount*, 156 N. C. 329, 72 S. E. 354 (1911).

Proceedings of Forfeiture under § 1-515. — Forfeiture cannot be enforced by judgment of a motion from office as a part of the punishment, where the clerk has been convicted of a misdemeanor, under this section in wilfully neglecting to discharge the duties of his office, but proceedings of forfeiture must be under § 1-515. *State v. Norman*, 82 N. C. 687 (1880).

Willful Neglect and Injury to Public. — It is to be observed that the essentials of the crime as prescribed are: first, a willful neglect in the discharge of official duty; and second, injury to the public. *State v. Anderson*, 196 N. C. 771, 147 S. E. 305 (1929).

Corrupt Intent Not Necessary. — It is not necessary to allege corrupt intent in a bill of indictment against county commissioners for neglect of duty in providing a necessary courthouse, and it is suffi-

cient if the words of the statute are followed. *State v. Loeper*, 146 N. C. 655, 61 S. E. 585 (1908).

However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. *State v. Anderson*, 196 N. C. 771, 147 S. E. 305 (1929), quoting from *State v. Hatch*, 116 N. C. 1003, 21 S. E. 436 (1895).

Liability for Honest Errors. — It is so well settled that there is nothing to the contrary that an officer who has to exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. *State v. Powers*, 75 N. C. 281 (1876).

"If the illegal act be done *mala fide*, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only." *State v. Snuggs*, 85 N. C. 542 (1881).

Accused Must Show Good Faith. — Where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is willful, and makes it incumbent upon him to rebut the presumption. *State v. Heaton*, 77 N. C. 505 (1877).

The Indictment. — It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. *State v. Anderson*, 196 N. C. 771, 147 S. E. 305 (1929).

Cited in *Moffitt v. Davis*, 205 N. C. 565, 172 S. E. 317 (1934).

§ 14-231. Failing to make reports and discharge other duties.—If any State or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all

moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor. (Rev., s. 3576; C. S., s. 4385.)

Cross References. — As to mandamus generally, see § 1-511 et seq. As to failure of sheriff to make return, see § 14-242. As to embezzlement by officers, see § 14-92. As to failure of a county officer to account for public funds, see §§ 153-47, 109-36, and 109-37.

Injurious Effect Not Necessary. — The crime exists although no injurious effects result to any individual because of the misconduct of the officer. *State v. Glasgow*, 1 N. C. 264 (1800).

Honesty of Purpose. — There may be neglect without corruption. Therefore honesty of purpose is not a full defense under this section. *Turner v. McKee*, 137 N. C.

251, 49 S. E. 330 (1904), and cases there cited.

Enforcing Unconstitutional Law. — An officer is not liable for obeying the mandates of an unconstitutional statute. *State v. Godwin*, 123 N. C. 697, 31 S. E. 221 (1898).

Liability on Official Bonds. — See § 109-33 et seq. and notes thereto.

Manager of Elections. — Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under this section. *State v. Cole*, 156 N. C. 618, 72 S. E. 221 (1911).

§ 14-232. Swearing falsely to official reports. — If any clerk, sheriff, register of deeds, county commissioner, county treasurer, justice of the peace, constable or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, State or school revenue, he shall be guilty of a misdemeanor. (1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; Code, s. 731; Rev., s. 3605; C. S., s. 4386.)

§ 14-233. Making of false report by bank examiners; accepting bribes. — If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the State prison for not less than four months nor more than ten years. (1903, c. 275, s. 24; Rev., s. 3324; 1921, c. 4, s. 79; C. S., s. 4387.)

Editor's Note. — The amendment of this section by Public Laws 1921, c. 4, § 79, effected one change. Prior to the 1921 amendment it was an offence to "receive

or accept" any bribe instead of to "keep or accept" any bribe as the section now reads.

§ 14-234. Director of public trust contracting for his own benefit. — If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board. (1825, c. 1269 P. R.; 1826, c. 29; R. C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C. S., s. 4388; 1929, c. 19, s. 1.)

Local Modification. — City of Greensboro: 1951, c. 707, s. 3.

Cross Reference. — As to State Highway and Public Works Commissioner selling materials to the Commission, see § 136-14.

Editor's Note. — The 1929 amendment added the two provisos.

Effect of Special Validating Act. — Although municipal bonds were sold to a corporation controlled by the mayor, an

act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. *Starmount Co. v. Ohio Sav. Bank, etc.*, Co., 55 F. (2d) 649 (1932).

Additional Service. — A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. *Davidson v. Guilford County*, 152 N. C. 436, 67 S. E. 918 (1910).

Officer of City and Corporation. — The prohibition of this section, extends to an officer of a corporation in making contracts between the corporation and the

city of which he is commissioner or alderman. *State v. Williams*, 153 N. C. 595, 68 S. E. 900 (1910).

Contracts with city when an alderman is an employee of the other contracting party are not covered by the section. *State v. Weddell*, 153 N. C. 587, 68 S. E. 897 (1910).

Contracts for Benefit of County. — A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. *State v. Garland*, 134 N. C. 749, 47 S. E. 426 (1904).

§ 14-235. Speculating in claims against towns, cities and the State. — If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or State officer shall engage in the purchasing of any county, city, town or State claim, including teacher's salary voucher, at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation on any such claim, he shall be guilty of a misdemeanor and shall be fined or imprisoned, and shall be liable to removal from office at the discretion of the court. (1868-9, c. 260; Code, s. 1009; Rev., s. 3575; C. S., s. 4389; 1923, c. 136, s. 208.)

Editor's Note. — The 1923 amendment inserted the words "including teacher's salary voucher," and replaced the words "speculation in any such claim" with "speculation on any such claim."

§ 14-236. Acting as agent for those furnishing supplies for schools and other State institutions. — If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the State, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the State, or any officer, agent, manager, teacher or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or State or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court. (1897, c. 543; 1899, c. 732, s. 73; Rev., s. 3833; C. S., s. 4390.)

Purchase of Property from Company Owned by Wife. — A member of the board of education of a county is not guilty under this section for voting as such member for the purchase of school buses from a company selling them owned by his wife,

and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. *State v. Debnam*, 196 N. C. 740, 146 S. E. 857 (1929).

§ 14-237. Buying school supplies from interested officer. — If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, the members of such board shall be removed

from their positions in the public service and shall, upon conviction, be deemed guilty of a misdemeanor. (1901, c. 4, s. 69; Rev., s. 3835; C. S., s. 4391.)

§ 14-238. Soliciting during school hours without permission of school head.—No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1933, c. 220.)

§ 14-239. Allowing prisoners to escape; burden of proof.—If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any *capias* issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (1791, c. 343, s. 1, P. R.; R. C., c. 34, s. 35; Code, s. 1022; 1905, c. 350; Rev., s. 3577; C. S., s. 4393.)

Cross References. — See also, § 14-257. As to liability for escape under civil process, see § 162-21.

General Consideration.—This is a common-law offense. *State v. Ritchie*, 107 N. C. 857, 12 S. E. 251 (1899). The statute contemplates two offenses — negligently permitting or wilfully promoting the escape—but charging negligence alone will suffice. *State v. McLain*, 104 N. C. 894, 10 S. E. 518 (1889). The section changes the ordinary rule of the burden of proof by shifting such burden to the defendant. *State v. Hunter*, 94 N. C. 829 (1886); *State v. Lewis*, 113 N. C. 622, 18 S. E. 69 (1893). The question of good faith and diligence of the officer is for the jury. *State v. Blockley*, 131 N. C. 726, 42 S. E. 569 (1902).

Right to Kill to Prevent Escape.—The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or, anything that would suggest danger to the person of the guard. *Holloway v. Moser*, 193 N. C. 185, 136 S. E. 375 (1927).

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has exercised due care in his selection. *State v. Lewis*, 113 N. C. 622, 18 S. E. 69 (1893).

Cited in *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103 (1892) (con. op.); *Sutton v. Williams*, 199 N. C. 546, 155 S. E. 160 (1930).

§ 14-240. Solicitor to prosecute officer for escape.—It shall be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the State, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (1791, c. 343, s. 2, P. R.; R. C., c. 34, s. 36; Code, s. 1023; Rev., s. 2822; C. S., s. 4394.)

§ 14-241. Disposing of public documents or refusing to deliver them over to successor.—It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the General Assembly, Supreme Court reports or other public documents are transmitted or deposited for the use of the county or the State, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, at the discretion of the court. (1881, c. 151; Code, s. 1073; Rev., s. 3598; C. S., s. 4395.)

§ 14-242. Failing to return process or making false return.—If any sheriff, constable or other officer, whether State or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor. (1818, c. 980, s. 3, P. R.; 1827, c. 20, s. 4; R. C., c. 34, s. 118; Code, s. 1112; Rev., s. 3604; C. S., s. 4396.)

Cross Reference. — See also, § 162-14 and annotation thereto.

Civil Process.—This section applies to failure to return civil as well as criminal process. *State v. Berry*, 169 N. C. 371, 85 S. E. 387 (1915), overruling *Harrell v. Warren*, 100 N. C. 259, 6 S. E. 777 (1888); *Mfg. Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264 (1890).

Process That Could Not Be Served.—

An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. *Fentress v. Brown*, 61 N. C. 373 (1867).

Cited in *State v. Brown*, 119 N. C. 827, 25 S. E. 820 (1896).

§ 14-243. Failing to surrender tax list for inspection and correction.—If any sheriff or tax collector shall refuse or fail to surrender his tax list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court. (1870-1, c. 177, s. 2; Code, s. 3823; Rev., s. 3788; C. S., s. 4397.)

§ 14-244. Failing to file report of fines or penalties.—If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor. (1901, c. 4, s. 62; Rev., s. 3579; C. S., s. 4398.)

Cross References. — As to misappropriation of fines, see § 115-182. As to treasurer of school fund failing to report, see § 115-174.

§ 14-245. Justices of the peace soliciting official business or patronage.—If any justice of the peace shall solicit official business, and/or patronage for his or her office, he or she shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1935, c. 58.)

§ 14-246. Failure of ex-justice of the peace to turn over books and papers.—If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty

of a misdemeanor. (Code, ss. 828, 829; 1885, c. 402; Rev., s. 3578; C. S., s. 4399.)

Cited in *Bailey v. Hester*, 101 N. C. 538, 13 S. E. 164 (1888); *Whitehurst v. Transportation Co.*, 109 N. C. 342, 13 S. E. 937 (1891).

§ 14-247. **Private use of publicly owned vehicle.**—It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. (1925, c. 239, s. 1.)

§ 14-248. **Obtaining repairs and supplies for private vehicle at expense of State.**—It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

§ 14-249. **Limitation of amount expended for vehicle.**—It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State, to expend from the public treasury an amount in excess of fifteen hundred dollars (\$1,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that nothing in §§ 14-247 through 14-251 shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so. (1925, c. 239, s. 3.)

§ 14-250. **Publicly owned vehicle to be marked.**—It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State or to some county, or institution or agency of the State, and that such car is "for official use only." Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal of the State and the designation of the department or agency to which the vehicle belongs. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866.)

Editor's Note. — The 1929 amendment added the first proviso, and the 1945 amendment added the second proviso.

§ 14-251. **Violation made misdemeanor.**—Any person, firm or corporation violating any of the provisions of §§ 14-247 to 14-250 shall be guilty of a misdemeanor, and punished by a fine of not less than one hundred dollars (\$100), nor more than one thousand dollars (\$1,000), or imprisonment in the discretion of the court. Nothing in §§ 14-247 through 14-251 shall apply to the purchase, use or upkeep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5.)

§ 14-252. **Five preceding sections applicable to cities and towns.**—Sections 14-247 through 14-251 in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

ARTICLE 32.

Misconduct in Private Office.

§ 14-253. **Failure of certain railroad officers to account with successors.**—If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the State's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and shall be punished in like manner. The Governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (1870-1, c. 72, ss. 1-3; Code, ss. 2001, 2002; Rev., s. 3760; C. S., s. 4400.)

Cross Reference.—As to duty of railroad officials to account to successors, see § 60-20.

Not Applicable to Tax Bond.—As this section has reference only to money,

books, choses, etc., an indictment can not be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. *State v. Jones*, 67 N. C. 310 (1872).

§ 14-254. **Malfeasance of corporation officers and agents.**—If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any officer of the corporation, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court. (1903, c. 275, s. 15; Rev., s. 3325; C. S., s. 4401.)

Cross Reference.—As to misapplication of funds by bank officers, see § 53-129.

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-255. **Escape of hired prisoners from custody.**—If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for the hiring out of prisoners by counties and towns, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and shall be imprisoned at hard labor not more than thirty days, or fined not more than fifty dollars. (1876-7, c. 196, s. 4; Code, s. 3455; Rev., s. 3658; C. S., s. 4403.)

Cross Reference.—As to power of counties, cities and towns to hire out prisoners, see §§ 153-191 through 153-193.

§ 14-256. Prison breach and escape.—If any person shall break prison, being lawfully confined therein, or shall escape from the custody of any superintendent, guard or officer, he shall be guilty of a misdemeanor. (1 Edw. II, st. 2d; R. C., c. 34, s. 19; Code, s. 1021; Rev., s. 3657; 1909, c. 872; C. S., s. 4404.)

Cross Reference.—As to penalty for escaping or assisting in an escape from the State prison, see § 148-45.

At Common Law. — The offense of breaking jail was a felony at common law, but by this section, all cases, no matter what the person is confined for, are reduced to a misdemeanor. *State v. Brown*, 82 N. C. 585 (1880).

Escape from Officer.—This section applies only to breaking prison or escaping therefrom and does not, because of its wording, include escape from an officer before being confined to prison. *State v. Brown*, 82 N. C. 585 (1880).

§ 14-257. Permitting escape of or maltreating hired convicts.—If any person charged in any way with the control or management of convicts, hired for service outside of the State's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any other criminal liability. (1881, c. 127, s. 2; Code, s. 3450; Rev., s. 3659; C. S., s. 4405; 1947, c. 781.)

Cross Reference.—As to escape of prisoners from negligent officer's custody, see § 14-239.

Editor's Note. — The 1947 amendment inserted "other" before the words "criminal liability" at the end of the section.

Negligence Test of Guilt.—Officers and public agents will not be held to the rigorous common-law rule of responsibility for the custody of convicts employed in labors outside of the penitentiary, actual

Cost of Recapture May Not Be Recovered from Prisoner.—The State may not recover of a prisoner moneys expended by it to recapture him after escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of the penal system. *State Highway, etc., Comm. v. Cobb*, 215 N. C. 556, 2 S. E. (2d) 565 (1939).

Cited in *Holloway v. Moser*, 193 N. C. 185, 136 S. E. 375 (1927).

negligence being the test of guilt. *State v. Johnson*, 94 N. C. 924 (1886).

Negligence Implied. — It is not necessary to prove negligence of the person having lawful custody of prisoners, for it is implied, unless occasioned by the act of God, or irresistible adverse force. *State v. Johnson*, 94 N. C. 924 (1886).

Cited in *State v. Sneed*, 94 N. C. 806 (1886).

§ 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.—If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted of furnishing the means shall be sentenced to not less than four years hard labor in the State's prison. (1873-4, c. 158, s. 12; Code, s. 3441; Rev., s. 3662; 1911, c. 11; C. S., s. 4406.)

Cross Reference. — As to furnishing prisoners with intoxicating liquors, narcotics, and firearms, see § 14-390.

§ 14-259. Harboring or aiding escaped prisoners.—It shall be unlawful for any person knowing, or having reasonable cause to believe, that any other person has escaped from any prison, jail, reformatory, or from the criminal insane department of any State hospital, or from the custody of any peace officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, to conceal, hide, harbor, feed, clothe, or offer aid and comfort in any manner to any such person.

Every person who shall conceal, hide, harbor, feed, clothe, or offer aid and comfort to any other person in violation of this section shall be guilty of a felony, if such other person has been convicted of, or was in custody upon the charge of a felony, and shall be punished by imprisonment in the State prison not more than five years; and shall be guilty of a misdemeanor, if such other person had been convicted of, or was in custody upon a charge of a misdemeanor, and shall be punished in the discretion of the court.

The provisions of this section shall not apply to members of the immediate family of such escapee. For the purposes of this section "immediate family" shall be defined to be the mother, father, brother, sister, wife, husband and child of said escapee. (1939, c. 72.)

Editor's Note. — For comment on this enactment, see 17 N. C. Law Rev. 348.

§ 14-260. Injury to prisoner by jailer.—If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor. (1795, c. 433, s. 6, P. R.; R. C., c. 87, s. 8; Code, s. 3463; Rev., s. 3661; C. S., s. 4407.)

Cross Reference.—As to the degree of protection against violence allowed the jailer in the State prison system, see § 148-46.

Evidence Sufficient for Jury.—Evidence that the plaintiff's thumb had inadvertently been placed against the door jamb when jailer started to close door of cell,

and that when plaintiff pushed against the door to release his thumb the jailer pushed the door shut with his shoulder, thereby cutting off plaintiff's thumb, is sufficient to be submitted to the jury on the issue of the jailer's negligent injury to the plaintiff. *Davis v. Moore*, 215 N. C. 449, 2 S. E. (2d) 366 (1939).

§ 14-261. Confining prisoners to improper apartments.—If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor. (1795, c. 433, s. 4; R. C., c. 87, s. 16; Code, s. 3471; Rev., s. 3660; C. S., s. 4408.)

Cross Reference.—As to apartments for prisoners, see § 153-51.

§ 14-262. Requiring female prisoners to work in chain gang.—If any officer, either judicial, executive or ministerial, shall order or require the working of any female on the streets or roads in any group or chain gang in this State, he shall be deemed guilty of a misdemeanor. (1897, c. 270; Rev., s. 3596; C. S., s. 4409.)

§ 14-263. Classification and commutation of time for prisoners other than State prisoners.—The board of county commissioners, or such governing body as may have charge of prisoners in any county, city or town in the State of North Carolina, shall divide all prisoners into three classes, or grades, as follows:

In the first class shall be included all those prisoners who have given evidence that they will, or who it is believed will observe the rules and regulations and work diligently and are likely to maintain themselves by honest industry after their discharge. These shall be known as Class A prisoners and shall receive a commutation of their sentences at the rate of one hundred and four days for each year served.

In the second class shall be included those prisoners who have not as yet given evidence that they can be trusted entirely, but are reasonably obedient to the rules and regulations. These shall be known as Class B prisoners and shall receive a commutation of their sentences of seventy-eight days for each year served.

In the third class shall be those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations and seriously interfere

with the discipline and the effectiveness of the labor of the other prisoners. Such prisoners shall receive no commutation of their sentences.

All prisoners shall be admitted into Class B except where it is known by the superintendent of the prison that a prisoner is serving for a second offense. In such cases the superintendent may put the prisoner in Class C in his discretion.

Prisoners of Class A shall be known as honor prisoners and shall be worked in the discretion of the superintendent of the prison without guards. When in prison camps or in any other place of detention they may not be chained or under armed guards.

Prisoners in Class B shall be under guard and may or may not be chained in the discretion of the superintendent.

Prisoners in Class C shall wear chains during the day or night as in the opinion of the superintendent may be necessary.

Preference in assignment of work shall be given Class A prisoners.

The purpose of §§ 14-263 through 14-265 is to unify the regulations pertaining to county prisoners and to encourage industriousness among the prisoners. (1927, c. 178, s. 1; 1937, c. 88, s. 2.)

Editor's Note.—The former mandatory to the use of stripes were repealed by the provisions of this section with reference. 1937 amendment.

§ 14-264. Record to be kept; items of record.—The superintendent or other person having charge of prisoners shall keep a record showing, the name, age, date of sentence, length of sentence, crime for which convicted, home address, next of kin, and the conduct of each prisoner received. (1927, c. 178, s. 2.)

§ 14-265. Commutation of sentences for Sunday work.—All prisoners in the State's prison, or in any county jail or county convict camp, who shall be assigned to regular work which requires the performance of the same, or substantially the same duties on Sundays as on other days of the week, shall be allowed a commutation of their sentences for each Sunday, or fractional part of a Sunday on which they shall be required to perform the duties of the task assigned to them. The commutation of sentence provided for in this section shall be in addition to all other commutations of sentence allowed such prisoners under existing statutes and laws of the State. (1931, c. 198, s. 1.)

ARTICLE 34.

Custodial Institutions.

§ 14-266. Persuading inmates to escape.—It shall be unlawful for any parent, guardian, brother, sister, uncle, aunt, or any person whatsoever to persuade or induce to leave, carry away, or accompany from any State institution, except with the permission of the superintendent or other person next in authority, any boy or girl, man or woman, who has been legally committed or admitted under suspended sentence to said institution by juvenile, recorder's, superior or any other court of competent jurisdiction. (1935, c. 307, s. 1; 1937, c. 189, s. 1.)

Editor's Note. — The 1937 amendment been "admitted under suspended sentence." included within the provisions of this and Apparently, there was a loophole in the following section inmates who have old law, 15 N. C. Law Rev. 341.

§ 14-267. Harboring fugitives.—It shall be unlawful for any person to harbor, conceal, or give succor to, any known fugitive from any institution whose inmates are committed by court or are admitted under suspended sentence. (1935, c. 307, s. 2; 1937, c. 189, s. 2.)

Editor's Note.—See note to § 14-266.

§ 14-268. Violation made misdemeanor.—Any person violating the provisions of this article shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court. (1935, c. 307, s. 3.)

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-269. **Carrying concealed weapons.**—If anyone, except when on his own premises, shall wilfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. Upon conviction or submission, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered disposed of by the presiding judge at the trial in one of the following ways:

(a) If the deadly weapon with reference to which the defendant shall have been convicted is a pistol or gun, and the rightful owner of the same is a person other than the defendant, such rightful owner may, at the time of defendant's conviction or submission, file a petition with the judge presiding at the trial for the recovery of such weapon and the same shall be returned to said owner upon a finding by the court (1) that he is now entitled to possession of same, and (2) that he was unlawfully deprived of possession without his consent or acquiescence.

(b) If the deadly weapon with reference to which the defendant shall have been convicted is a bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor or weapon of like kind, the same shall be destroyed. However, pistols or guns may be confiscated and ordered turned over to the clerk of the superior court of the county in which the trial is held by the judge presiding at the trial. Under the direction of said clerk of the superior court the weapon shall be sold after one advertisement in a newspaper having a general circulation in the county, at public auction, which shall be held at least once a year. The proceeds of the sale of the weapon or weapons shall go to the general fund of the county in which the weapon or weapons were confiscated and sold. The clerk of the superior court shall keep a record and inventory of all weapons received by him and sold under his direction; provided, however, that in any case the presiding judge may, if the facts so justify, order any pistol or gun returned to the defendant.

This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C. S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217.)

Local Modification. — Caswell: 1941, c. 90; Durham: 1923, c. 48; Franklin: Ex. Sess. 1924, c. 30; Halifax: 1943, c. 34.

Cross References.—As to tramps carrying weapons, see § 14-339. As to going armed on Sunday, see § 103-2.

Editor's Note. — Public Laws, 1929, c. 224, added the qualifying clause, near the beginning of the last paragraph, which reads "when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons".

Prior to the 1947 amendment the confiscation and destruction of a weapon carried

by a person convicted under this section was mandatory in all cases, even though the weapon may have been stolen by the convicted person from one who had a right to possess it. See 25 N. C. Law Rev. 402.

The 1949 amendment rewrote this section. See 27 N. C. Law Rev. 450.

Includes Butcher Knife. — The act of Assembly making it indictable for one to carry concealed about his person any "pistol, bowie knife, razor or other deadly weapon of like kind," embraces a butcher's knife. State v. Erwin, 91 N. C. 545 (1884).

Concealment Is Gist of Offense.—The mischief provided against is the practice of wearing weapons concealed about the person to be used upon any emergency. *State v. Broadnax*, 91 N. C. 543 (1884). The intent to carry, not the intent to use, determines the guilt. *State v. Reams*, 121 N. C. 556, 27 S. E. 1004 (1897). But the weapon carried must be concealed. *State v. Lilly*, 116 N. C. 1049, 21 S. E. 563 (1895). If the weapon is carried openly the defendant could not be guilty under this section. *State v. Brown*, 125 N. C. 704, 34 S. E. 549 (1899).

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose to so carry it that it may not be seen. *State v. Gilbert*, 87 N. C. 527 (1882).

The question is as to the manner of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it. *State v. Brown*, 125 N. C. 704, 34 S. E. 549 (1899).

But if from defendant's own testimony it appears that he necessarily knew that he was carrying it concealed intent is immaterial. *State v. Simmons*, 143 N. C. 613, 56 S. E. 701 (1907).

The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of this section, although the statute makes such possession *prima facie* evidence of the concealment thereof. *State v. Vanderburg*, 200 N. C. 713, 158 S. E. 248 (1931).

Same—Weapon on Person *Prima Facie* Evidence.—The fact that defendant had a pistol about his person, off of his own premises, was *prima facie* evidence of concealment, which shifted the burden upon the defendant to rebut or disprove. *State v. McManus*, 89 N. C. 555 (1883); *State v. Lilly*, 116 N. C. 1049, 21 S. E. 563 (1895); *State v. Reams*, 121 N. C. 556, 27 S. E. 1004 (1897); *State v. Hamby*, 126 N. C. 1066, 35 S. E. 614 (1900).

Same — Presumption Rebutted.—To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. *State v. Gilbert*, 87 N. C. 527 (1882); *State v. Brown*, 125 N. C. 704, 34 S. E. 549 (1899).

Same—Concealment Question for Jury.—Whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. *State v. Reams*,

121 N. C. 556, 27 S. E. 1004 (1897). See also *State v. Lilly*, 116 N. C. 1049, 21 S. E. 563 (1895).

Carrying on Own Premises.—The use of the words, "on his own premises," and not being "on his own lands," in this section, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives. *State v. Perry*, 120 N. C. 580, 26 S. E. 915, 1009 (1897).

A superintendent or overseer of a department of a cotton mill, is not, while therein, "on his premises," within the meaning of this section. *State v. Bridgers*, 169 N. C. 309, 84 S. E. 689 (1915).

Same — Servant on Employer's Premises.—A mere servant or hiring who carries concealed weapons on the premises of his employer is indictable. *State v. Deyton*, 119 N. C. 880, 26 S. E. 159 (1896).

Warrant Must State Defendant Carried Weapon Off His Own Premises.—In prosecution for carrying a concealed weapon, the warrant is held fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried concealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. *State v. Bradley*, 210 N. C. 290, 186 S. E. 240 (1936).

Illustrations—Not on Person but within Reach.—The language of the statute is, not "concealed on his person," but "concealed about his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. *State v. McManus*, 89 N. C. 555 (1883).

Same — Pistol in Coat on Shoulder.—Upon evidence tending to show that the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. *State v. Mangum*, 187 N. C. 477, 121 S. E. 765 (1924).

Same—Carrying to Deliver to Another.—One is not guilty of a violation of this section where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him

for it. *State v. Broadnax*, 91 N. C. 543 (1884).

Same — Apprehension of Assault. — Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by this section. *State v. Woodlief*, 172 N. C. 885, 90 S. E. 137 (1916).

Same—Acting upon Advice of Attorney. —A person acting in ignorance of the law in good faith and upon advice of the clerk of the court or of an attorney, but in violation of this section, is not excused. *State v. Simmons*, 143 N. C. 613, 56 S. E. 701 (1907).

Exceptions—Necessity of Being in Performance of Duties. — In order to come within the exception of this section, the defendant, otherwise having the authority, must have been in the actual performance of his duties at the time. *State v. Simmons*, 143 N. C. 613, 56 S. E. 701 (1907).

Same—Officials of Transportation Companies. —The exception in this section does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. *State v. Perry*, 120 N. C. 580, 26 S. E. 915, 1008 (1897).

Same—United States Mail Carrier. —A United States mail carrier is indictable under this section for carrying a concealed weapon while carrying the mail and while returning to his home after delivering the mail. *State v. Boone*, 132 N. C. 1107, 44

S. E. 595 (1903).

Same—Night Watchman. — A private night watchman is not guilty of carrying a concealed weapon, under this section, while on duty upon the premises he is employed to watch. *State v. Anderson*, 129 N. C. 521, 39 S. E. 824 (1901).

Jurisdiction. — The superior court does not acquire jurisdiction over a prosecution for carrying a concealed weapon by the fact at the time of the presentation of the indictment therefor it had exclusive cognizance of such offense, where, at the time of the commission of the offense sole jurisdiction was in justices of the peace. *State v. Ramsour*, 113 N. C. 642, 18 S. E. 707 (1893).

Former Conviction of Assault. —A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. *State v. Robinson*, 116 N. C. 1046, 21 S. E. 701 (1895).

Time Not Essence of Offense. — Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803 (1923).

Punishment. — In a penal statute "or" will never be construed "and" so as to make it more penal. Hence one found guilty under this section could not be both fined and imprisoned. *State v. Taylor*, 124 N. C. 803, 32 S. E. 548 (1899).

Cited in *State v. Divine*, 98 N. C. 778, 4 S. E. 477 (1887); *State v. Barrett*, 138 N. C. 630, 50 S. E. 506 (1905); *State v. Sauls*, 199 N. C. 193, 154 S. E. 28 (1930).

§ 14-270. Sending, accepting or bearing challenges to fight duels. —If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the State, any pardon or reprieve notwithstanding. (1802, c. 608, s. 1, P. R.; R. C., c. 34, s. 48; Code, s. 1012; Rev., s. 3628; C. S., s. 4411.)

Cross References. —As to killing adversary in duel, see § 14-20. See Article XIV, § 2, of the State Constitution.

Editor's Note. —See *State v. Farrier*, 8 N. C. 487 (1821); *State v. Fritz*, 133 N. C. 725, 45 S. E. 957 (1903).

§ 14-271. Engaging in and betting on prize fights. —If any two or more persons engage in a prize fight, sparring match or glove or fist contest for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars, or imprisoned in the State's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court. (1895, c. 28, ss. 1-4, Rev., s. 3707; C. S., s. 4412.)

Local Modification. — Robeson: Pub. Loc. 1925, c. 270; Carteret: 1947, c. 174; Vance: Pub. Loc. 1927, c. 497.

Cross Reference. — As to power of the Governor to prevent prize fights, see § 147-12, paragraph 6.

§ 14-272. Disturbing picnics, entertainments and other meetings.

—If any person shall willfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainment, political meeting or other meeting or organization is held, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court. (1897, c. 213; Rev., s. 3704; C. S., s. 4413.)

Application.—The section applies to disturbing Sunday school, *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908), and family reunions, *State v. Starnes*, 151 N. C. 724, 66 S. E. 347 (1909).

§ 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.—If any person shall wilfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. (Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28; Rev., s. 3838; C. S., s. 4414.)

Preventing Use of School Building.—To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of this section. *State v. Spray*, 113 N. C. 686, 18 S. E. 700 (1893).

§ 14-274. Disturbing students at schools for women.—It shall be unlawful for any male person to willfully disturb, annoy or harass the students of any boarding school or college for women situated anywhere in North Carolina by rude conduct or by persistent unnecessary presence on or near the property of the school or college; or by the willful addressing or communicating orally or otherwise with said students while on school property, or while elsewhere when in charge of a teacher, officer or student of said school. The violation of this section shall be deemed a misdemeanor punishable by a fine of not less than five dollars (\$5) nor more than fifty dollars (\$50), or by imprisonment not to exceed thirty days. (1925, c. 189, s. 1.)

Editor's Note. — For a criticism of the wisdom and necessity for this law, see 3 N. C. Law Rev. 143.

§ 14-275. Disturbing religious congregations.—If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned in the discretion of the court. (1901, c. 738; Rev., s. 3706; C. S., s. 4415.)

In General.—In order to render indictable the disturbance of persons assembled for divine worship, the people, or some considerable number, must be collected at or about the time when worship is about to commence, and in the place where it is to be celebrated. *State v. Bryson*, 82 N. C. 576 (1880). But the congregation need not be engaged in the act of worship. *State v. Ramsey*, 78 N. C. 448 (1878). However the indictment will not lie after

the congregation has dispersed. *State v. Davis*, 126 N. C. 1059, 35 S. E. 600 (1900). The act itself must disturb the congregation—information of the act, for example that a fight is in progress, will not suffice. *State v. Kirby*, 108 N. C. 772, 12 S. E. 1045 (1891).

Persistent speaking in church after remonstrance from the minister has been held sufficient to sustain a verdict under this section (see *State v. Ramsey*, 78 N. C.

448 (1878)) but not persistence in singing off the key where the intention is not to disturb. *State v. Linkhaw*, 69 N. C. 214 (1873).

Disturbing Sunday School.—See note to § 14-272.

Family Gathering.—See *State v. Starnes*, 151 N. C. 724, 66 S. E. 347 (1909).

The Indictment.—The indictment should charge that the assembly had met “for

divine worship,” “divine service,” “religious worship or service,” or something of the same import. *State v. Fisher*, 25 N. C. 111 (1842).

Where the charge against the defendant is disturbing a congregation actually engaged in divine worship, it is variance to show merely the disturbance of parties assembled for such worship. *State v. Bryson*, 82 N. C. 576 (1880).

§ 14-275.1. Disorderly conduct at bus or railroad station or airport.—Any person shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars (\$50.00) or imprisonment for not more than thirty days, in the discretion of the court, if such person while at, or upon the premises of, (1) any bus station, depot or terminal, or (2) any railroad passenger station, depot or terminal, or (3) any airport or air terminal used by any common carrier, or (4) any airport or air terminal owned or leased, in whole or in part, by any county, municipality or other political subdivision of the State, or privately owned airport shall (a) engage in disorderly conduct, or (b) use vulgar, obscene or profane language, or (c) on any one occasion, without having necessary business there, loiter and loaf upon the premises after being requested to leave by any peace officer or by any person lawfully in charge of such premises. (1947, c. 310.)

Editor's Note.—The title of the act inserting this section refers only to airports and airport terminals.

§ 14-276. Detectives going armed in a body.—If any body of men composed of more than three persons, calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives, shall go armed, they shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1893, c. 191; Rev., s. 3703; C. S., s. 4416.)

§ 14-277. Impersonation of peace officers.—It shall be unlawful for any person other than duly authorized peace officers or officers of the court to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers. Nothing in this section shall be construed to prohibit a private citizen in whose presence a felony has been committed from arresting such person or persons participating in the commission of said felony when such arrest is deemed necessary, or to prohibit any private citizen in whose presence an act, which would constitute a breach of the peace and for which an indictment would lie, is committed from arresting such person or persons committing said breach of the peace when such arrest is deemed necessary. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction may be fined or imprisoned at the discretion of the court. (1927, c. 229.)

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses against the Public Safety.

§ 14-278. Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.—If any person shall willfully and maliciously put or place any matter or thing upon, over or near any railroad track; or shall willfully and maliciously destroy, injure or remove the

roadbed, or any part thereof, or any rail, sill or other part of the fixture appurtenant to or constituting or supporting any portion of the track of such railroad; or shall willfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall willfully and maliciously injure the roadbed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the State's prison or county jail not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time of not less than three nor more than seven years. If it shall happen that by reason of the commission of the offenses aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the person is killed, and shall be imprisoned in the State's prison not less than five nor more than sixty years if the person is maimed or disabled. If any person shall maliciously destroy or injure any plank-road, turnpike or canal, or any appurtenance or fixture belonging thereto or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purpose of navigation, or improving the navigation of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section is provided for maliciously injuring a railroad. (1838, c. 38; R. C., c. 34, ss. 99, 100; 1879, c. 255, s. 2; Code, s. 1098; Rev., s. 3754; 1911, c. 200; C. S., s. 4417.)

Cited in *State v. Freeman*, 230 N. C. 725, 55 S. E. (2d) 500 (1949).

§ 14-279. Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.—If any person, unlawfully, and on purpose, but without malice, shall commit any of the offenses mentioned in § 14-278, he shall be guilty of a misdemeanor. If it shall happen that by reason of the commission of any such offense any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, shall be imprisoned not less than twelve months, and fined at the discretion of the court. (R. C., c. 34, s. 101; Code, s. 1099; Rev., s. 3755; C. S., s. 4418.)

§ 14-280. Shooting or throwing at trains or passengers.—If any person shall willfully and unlawfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or State's prison, at the discretion of the court. (1876-7, c. 4; Code, s. 1100; 1887, c. 19; Rev., s. 3763; 1911, c. 179; C. S., s. 4419.)

Intent a Question for Jury. — Where a defendant was indicted, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the

jury, and it was for them to say whether the presumption had been rebutted. *State v. Barbee*, 92 N. C. 820 (1885).

Proof That Gun Was Loaded Unnecessary.—If a gun be unloaded and this is relied on as a defense, in an action for shoot-

ing at a train, the fact must be shown by the defendant. *State v. Hinson*, 82 N. C. 597 (1880).

Proof of Conspiracy. — Upon trial for throwing stones at a train, it is not necessary to show a conspiracy, it appearing that the several defendants were not only present, but threw stones at different coaches of the same train. *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910).

The Indictment. — Upon a trial for throwing stones at a train, a charge in the

bill that it was done "from one station to another" follows the form set out in the statute, and is not void for vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910).

But it must charge that the train was in actual motion or stopped for a temporary purpose. *State v. Boyd*, 86 N. C. 634 (1882).

§ 14-281. Operating trains and street cars while intoxicated.—Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (1871-2, c. 138, s. 38; Code, s. 1972; 1891, c. 114; Rev., s. 3758; 1907, c. 330; C. S., s. 4420.)

§ 14-282. Displaying false lights on seashore.—If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than four months nor more than ten years. (1831, c. 42; R. C., c. 34, s. 58; Code, s. 1024; Rev., s. 3430; C. S., s. 4421.)

§ 14-283. Exploding dynamite cartridges and bombs.—If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor. (1887, c. 364, s. 53; Rev., s. 3794; C. S., s. 4423.)

Cross References.—As to burglary with explosives, see § 14-57. As to willful injury with explosives, see § 14-49.

§ 14-284. Keeping for sale or selling explosives without a license.—If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor. (1887, c. 364, ss. 1, 4; Rev., s. 3817; C. S., s. 4425.)

§ 14-285. Failing to enclose marl beds.—If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this shall not apply to any person whose marl bed is situated inside his own inclosure. (1887, cc. 235, 268; Rev., s. 3796; C. S., s. 4426.)

Cited in *Wellons v. Sherrin*, 217 N. C. 534, 8 S. E. (2d) 820 (1940) (dis. op.).

§ 14-286. Giving false fire alarms; molesting fire alarm system.—It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet any one in giving a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever

of any station or signal box of any municipal fire alarm system, except in case of fire, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of the fire alarm system of any municipality. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 46; C. S., s. 4426(a).)

§ 14-287. Leaving unused well open and exposed.—It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court. (1923, c. 125; C. S., s. 4426(c).)

Editor's Note.—This section is said to be a sensible regulation in 1 N. C. Law Rev. 300. **Cited in** Wellons v. Sherrin, 217 N. C. 534, 8 S. E. (2d) 820 (1940).

§ 14-288. Unlawful to pollute any bottles used for beverages.—It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or to send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined on the first offense, one dollar for each bottle so defiled, and for any subsequent offense not more than ten dollars for each bottle so defiled. (1929, c. 324, s. 1.)

Cross Reference.—As to destruction or taking of soft drink bottles, see § 14-86.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-289. Advertising lotteries.—If any one, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (1887, c. 211; Rev., s. 3725; C. S., s. 4427.)

See the discussion in 5 N. C. Law Rev. 31.

§ 14-290. Dealing in lotteries.—If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding

six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. (1834, c. 19, s. 1; R. C., c. 34, s. 69; 1874-5, c. 96; Code, s. 1047; Rev., s. 3726; C. S., s. 4428; 1933, c. 434; 1937, c. 157.)

Editor's Note.—The 1933 amendment added the last sentence of this section, relating to possession of tickets, certificates, etc.

The 1937 amendment inserted the words "bottle crowns, bottle caps, seals on containers, other devices" in the second sentence.

In General.—A lottery may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340 (1915). Statutes, such as this section, regulating such schemes violate neither the State nor federal Constitution. They are remedial and should be liberally construed. And the fact that the device is an advertising scheme of an otherwise legitimately run business concern does not prevent the section from applying. *Brevard Mfg. Co. v. Benjamin & Sons*, 172 N. C. 53, 89 S. E. 797 (1916). See also *State v. Lumsden*, 89 N. C. 572 (1883).

This section refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while G. S., 14-291.1, deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to affect those persons engaged in promoting a particular kind of lottery. *State v. Robinson*, 224 N. C. 412, 30 S. E. (2d) 320 (1944).

Amendment of 1933 Is Valid.—The 1933 amendment to this section which makes the possession of tickets, etc., used in the operation of a lottery prima facie evidence of violation of the section, is constitutional and valid, the presumption being a rational one. *State v. Fowler*, 205 N. C. 608, 172

S. E. 191 (1934).

Actual Physical Possession Unnecessary.—The possession of lottery tickets sufficient to raise prima facie evidence of the violation of this section, need not be actual physical possession, and they need not be found on defendant's person, it being sufficient if they are found in his place of business under his control. *State v. Jones*, 213 N. C. 640, 197 S. E. 152 (1938).

Note for Lottery Contract.—Notes given in pursuance of a contract prohibited by this section are for an illegal consideration, and collection thereof is not enforceable in our courts. *Brevard Mfg. Co. v. Benjamin & Sons*, 172 N. C. 53, 89 S. E. 797 (1916).

Surety to Lottery Contract.—A bond guaranteeing the performance of a "trade expansion contract" which is contrary to this section, is as unenforceable against the surety thereon as the contract upon which it is founded. *Basnight v. American Mfg. Co.*, 174 N. C. 206, 93 S. E. 734 (1917).

Lottery Privilege Not a Contract.—A right, conferred in the charter of a corporation, to dispose of property by means of lottery tickets, is not a contract between the corporation and the State, but a mere privilege or license, and is revocable at will by the legislative power. *State v. Morris*, 77 N. C. 512 (1877).

Purchaser Not Included.—This section does not embrace persons who buy lottery tickets. *State v. Bryant*, 74 N. C. 207 (1876).

Admissibility of Evidence.—In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. The declaration of one defendant as to the other's participation in the enterprise and as to their protection if they were caught was also competent. *State v. Ingram*, 204 N. C. 557, 168 S. E. 837 (1933).

In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, was

held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. *State v. Bryant*, 231 N. C. 106, 55 S. E. (2d) 922 (1949).

Sufficiency of Evidence.—Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant is sufficient to be submitted to the jury in a prosecution under this section, and defendant's contention that there was no evidence that he was in charge of the store is untenable when the record discloses that several witnesses referred to the locus in quo as defendant's place of business. *State v. Jones*, 213 N. C. 640,

197 S. E. 152 (1938).

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same, is sufficient to be submitted to the jury in prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a prima facie case under the provisions of this section. *State v. Powell*, 219 N. C. 220, 13 S. E. (2d) 232 (1941).

Evidence held insufficient to show violation of this section. *State v. Heglar*, 223 N. C. 220, 34 S. E. (2d) 76 (1945).

Applied in *State v. Blanton*, 207 N. C. 872, 180 S. E. 81 (1935); *State v. King*, 224 N. C. 329, 30 S. E. (2d) 230 (1944).

§ 14-291. Selling lottery tickets and acting as agent for lotteries.—If any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor, and shall be punished as provided for in § 14-290. (1834, c. 19, s. 2; R. C., c. 34, s. 70; Code, s. 1048; Rev., s. 3727; C. S., s. 4429.)

Evidence held insufficient to show violation of this section. *State v. Heglar*, 223 N. C. 220, 34 S. E. (2d) 76 (1945).

Cited in *State v. Yarbboro*, 194 N. C. 498, 140 S. E. 216 (1927) (con. op.).

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.—If any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550.)

Cross Reference. — See annotations under § 14-290.

Admissibility of Evidence.—In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. *State v. Bryant*, 231 N. C. 106, 55 S. E. (2d) 922 (1949).

Sufficiency of Evidence.—Evidence held insufficient to show violation of this section. *State v. Heglar*, 223 N. C. 220, 34 S. E. (2d) 76 (1945).

Punishment. — A sentence and fine imposed upon conviction of violating this section are in personam; an order of confiscation entered under § 14-299 is in rem and is no part of the personal judgment against the accused. *State v. Richardson*, 228 N. C. 426, 45 S. E. (2d) 536 (1947). See note to § 14-299.

§ 14-292. Gambling.—If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor. (1891, c. 29; Rev., s. 3715; C. S., s. 4430.)

Cross Reference. — As to gaming contracts, see § 16-1 et seq.

Editor's Note.—See 11 N. C. Law Rev.

248, for reference to acts legalizing pari-mutuel race track betting.

In General.—Betting is essential to the

offense; playing without betting is not indictable. *State v. Brannen*, 53 N. C. 205 (1860). The section does not apply to prizes given for skill—here there is no betting. *State v. Deboy*, 117 N. C. 702, 23 S. E. 167 (1895). Tenpins is not a game of chance. *State v. King*, 133 N. C. 631, 18 S. E. 169 (1903).

All who engage in gambling are principals. *State v. Deboy*, 117 N. C. 702, 23 S. E. 167 (1895). A defendant may be indicted for keeping a gaming house and playing for money, without misjoinder. *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033 (1903).

Calling Transaction a Raffle. — Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. *State v. Deboy*, 117 N. C. 702, 23 S. E. 167 (1895).

Horse racing is included in the category of "gaming" or "gambling." The word "game" is very comprehensive and em-

braces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and it is gaming. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286 (1942).

Betting on horse racing, or on any other sort of race, is an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286 (1942).

Ordinances as to Gambling Void. — Gambling being an offence under the general law, a city ordinance covering the same subject is void. *State v. McCoy*, 116 N. C. 1059, 21 S. E. 690 (1895).

Sufficiency of Indictment. — An indictment charging defendant with keeping and maintaining a gaming house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or tables where games of chance were played. *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033 (1903).

§ 14-293. Allowing gambling in houses of public entertainment; duty of police officers; penalty.—If any keeper of an ordinary or other house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this State. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. It shall be the duty of every police officer of the cities, towns and villages of this State to make diligent inquiry and to exercise constant watchfulness to discover whether any of the offenses enumerated in this section are being committed, and to report once a week under oath to the mayor or other chief officer of his city, town or village, whether such offenses are being committed, and all the facts within his knowledge, or of which he has information relating thereto. If any such police officer shall know or have information that such offenses are being committed and shall fail or neglect to report the same to such mayor or other chief officer, together with all the information known to him, as to the person or persons committing the same, the time and place of the commission and the names of the witnesses thereto, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court, and shall forfeit his office. It shall be the duty of such mayor or other chief officer to require the report herein provided for, and to require that the same shall be verified by the oath of such policeman,

and if it appear upon such report that any of the said offenses have been committed, it shall be the duty of such mayor or other chief officer to issue his warrant for the arrest of the offender. Any such mayor or other chief officer of any city, town or village who shall fail or neglect to require the reports herein mentioned, or shall fail or neglect to require of such police officer to verify the same upon oath, or who shall refuse or neglect, upon its appearing from such reports that there is probable cause to believe that any of the said offenses have been committed, to issue his warrant for the arrest of the offender, shall be guilty of a misdemeanor. Any person committing any of the offenses mentioned in this section shall be liable to a penalty of five hundred dollars, to be recovered by suit in the superior court in the county in which such offense may have been committed, one-half thereof to the use of the person bringing such suit and one-half to the school fund for the county. (1799, c. 526, P. R.; 1801, c. 581, P. R.; 1831, c. 26; R. C., c. 34, s. 76; Code, s. 1043; 1901, c. 753; Rev., s. 3716; C. S., s. 4431.)

Gambling in Leased Room of Tavern.—Where it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendant landlord could not be convicted under this section. *State v. Keisler*, 51 N. C. 73 (1858).

Houses Where Liquor Was Retail.—

For case under this provision, see *State v. Terry*, 20 N. C. 325 (1839).

Excessive Punishment.—For the violation of this section a fine of two thousand dollars and imprisonment for thirty days, and thereafter until the fine and costs were paid, was held not excessive punishment. *State v. Miller*, 94 N. C. 904 (1886).

§ 14-294. **Gambling with faro banks and tables.**—If any person shall open, establish, use or keep a faro bank, or a faro table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and shall be fined at least two hundred dollars and imprisoned not less than three months. (1848, c. 34; R. C., c. 71; 1856-7, c. 25; Code, s. 1044; Rev., s. 3717; C. S., s. 4432.)

Cross Reference.—As to compelling testimony in cases when this section and §§ 14-295 through 14-297 have been vio-

lated, see § 8-55.

Cited in *State v. Norwood*, 94 N. C. 935 (1886).

§ 14-295. **Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.**—If any person shall establish, use or keep any gaming table (other than a faro bank), by whatever name such table may be called, an illegal punchboard or an illegal slot machine, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars and shall be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars. (1791, c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 72; Code, s. 1045; Rev., s. 3718; C. S., s. 4433; 1931, c. 14, s. 2.)

Cross Reference.—See notes to §§ 14-292 and 14-296.

C. 935 (1886).

The Indictment.—An indictment under this section is good, without any averment that the act was done “willfully and unlawfully” or that the games of chance were played at such table for money or other property. *State v. Howe*, 100 N. C. 449, 5 S. E. 671 (1888).

But a bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. *State v. Norwood*, 94 N.

Evidence Admissible.—Where defendants admit keeping gaming tables, evidence may be admitted tending to show they were continuously present at the place and tending to show their large share in the receipts of these tables. *State v. Galloway*, 188 N. C. 416, 124 S. E. 745 (1924).

Cited in *State v. Bryant*, 74 N. C. 207 (1876); *State v. Humphries*, 210 N. C. 406, 186 S. E. 473 (1936); *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272 (1940).

§ 14-296. Illegal slot machines and punchboards defined.—An illegal slot machine or punchboard within the contemplation of §§ 14-295 through 14-298 is defined as one that shall not produce for or give to the person who places coin or money or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. (1931, c. 14, s. 1.)

Editor's Note.—The act from which this section was taken amended §§ 14-295 through 14-298 to make them applicable to illegal slot machines and punchboards. The act expressly provided that it should not have the effect of modifying in

any way §§ 14-301 through 14-303 and should be construed as supplemental thereto.

Cited in *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49 (1938).

§ 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.—If any person shall knowingly suffer to be opened, kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables prohibited by §§ 14-289 through 14-300 or any illegal punchboard or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned. (1798, c. 502, s. 3, P. R.; 1800, c. 5, s. 2, P. R.; R. C., c. 34, s. 73; Code, s. 1046; Rev. s. 3719; C. S., s. 4434; 1931, c. 14, s. 3.)

Cross Reference.—See note to § 14-296.

Where the agreed statement of facts in an action to recover the penalty under this section states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are

insufficient to support a judgment against defendant. *Nivens v. Justice*, 210 N. C. 349, 186 S. E. 237 (1936).

Cited in *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272 (1940).

§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by justices and police officers.—All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by §§ 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (1791, c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C. S., s. 4435; 1931, c. 14, s. 4.)

Cross Reference.—See note to § 14-296.

Enjoining Officers. — The court should have found whether the slot machines involved were illegal in determining the plaintiff's right to enjoin officers from interfering with his business. *McCormick*

v. Proctor, 217 N. C. 23, 6 S. E. (2d) 870 (1940).

Cited in *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992 (1905); *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941) (dis. op.).

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.—All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, shall be liable to be seized by any justice of the peace or other court of competent jurisdiction or by any person acting under his or its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (1798, c.

502, s. 3, P. R.; R. C., c. 34, s. 77; Code, s. 1051; Rev., s. 3722; C. S., s. 4436; 1943, c. 84.)

Editor's Note.—The 1943 amendment inserted in the first sentence the words "or used in the conduct of any such game." Prior to the amendment one-half of the moneys or property seized went to the person seizing them and the other half went to the use of the poor.

A confiscation order entered under this section is no part of the personal judgment imposed under § 14-291.1. Hence, a defendant may comply with the personal judgment entered against him upon conviction of violating § 14-291.1, and at the

same time prosecute an appeal from an order of confiscation entered under this section, whether embraced in the same judgment or not; but the failure to appeal the personal judgment, while not estopping him for further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. *State v. Richardson*, 228 N. C. 426, 45 S. E. (2d) 536 (1947).

Cited in *North Carolina v. Vanderford*, 35 F. 282 (1888).

§ 14-300. Opposing destruction of gaming tables and seizure of property.—If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the State and the person so opposed, and shall, moreover, be guilty of a misdemeanor. (1798, c. 502, s. 4, P. R.; R. C., c. 34, s. 78; Code, s. 1052; Rev., s. 3723; C. S., s. 4437.)

Cited in *North Carolina v. Vanderford*, 35 F. 282 (1888).

§ 14-301. Operation or possession of slot machine; separate offenses.—It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2; C. S., s. 4437(a).)

Editor's Note.—It was said in 1 N. C. Law Rev. 285, that "the interesting part of the statute is the definition of unlawful machine or device as one that does not produce for or give to the person operating, playing or patronizing the machine or device 'the same return in market value each and every time such machine or device is operated or patronized by paying money or other thing of value.' The act seems to cover all possible gambling devices not already covered by the lottery provisions of the Consolidated Statutes."

Construed with § 14-304.—This and the two following sections proscribing the operation and possession of slot machines of the type therein defined, are not repealed by §§ 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941).

Where an indictment charged defendant in one count with ownership, sale, lease

and transportation of certain slot machines and devices prohibited by law, §§ 14-304 through 14-309, and charged defendant in the second count with the operation and possession of certain illegal slot machines, under this and the two following sections, it was held that the different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941).

Value Required to Be Given.—Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemna-

tion of the statute. *State v. May*, 188 N. C. 470, 125 S. E. 9 (1924).

License of Lawful Machines Only.—The State license issued for the operation of a slot machine is for one that is lawful and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. *State v. May*, 188 N. C. 470, 125 S. E. 9 (1924).

Sufficiency of Indictment.—An indict-

ment charging that the defendant “unlawfully and wilfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute,” etc., is insufficient because it fails to inform the accused of the specific offense or the necessary ingredients thereof, notwithstanding the statute is cited. *State v. Ballangee*, 191 N. C. 700, 132 S. E. 795 (1926).

Cited in *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49 (1938).

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.—It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played or patronized by paying of money or other thing of value for the privilege thereof. Each time said punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played, or patronized by the paying of money or other thing of value therefor, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4; C. S., s. 4437(b).)

An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being

operated, is fatally defective. *State v. Jones*, 218 N. C. 734, 12 S. E. (2d) 292 (1940).

Applied in *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244 (1945).

§ 14-303. Violation of two preceding sections a misdemeanor.—A violation of any of the provisions of §§ 14-301, 14-302 shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the court, by both. (1923, c. 138, s. 5; C. S., s. 4437(c).)

Applied in *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244 (1945).

§ 14-304. Manufacture, sale, etc., of slot machines and devices.—It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device. (1937, c. 196, s. 1.)

Editor's Note.—For comment on this and the following sections, see 15 N. C. Law Rev. 340.

Constitutionality. — This and following sections, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon which wages may be made, and differentiating between such machines and those returning a definite and unvarying service or things of value each time they are played, are in accord with the policy of the State to sup-

press gambling and have a reasonable relation to this objective, and this statute is constitutional as a reasonable regulation relating to the public morals and welfare, well within the police power of the State. *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49 (1938); *State v. Abbott*, 218 N. C. 470, 11 S. E. (2d) 539 (1940).

Construed with § 14-301.—See note to § 14-301.

Not Repealed by 1939 Licensing Act.—The provisions of the Flanagan Act, ch.

196, Public Laws of 1937, proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine are not repealed by § 105-66, since subsection 5 of that section expressly negatives the intention to license or legalize any gaming slot machine or device, and since subsection 1 of that section excludes from its licensing provisions slot machines which "automatically vend" any prize, coupon or reward which may be used in the further operation of such machine, the word "vend" being equivalent to the word "give" and the intent being to exclude from the licensing provisions a machine which provides a player with additional

plays or games as a premium, prize, or reward irrespective of whether physical tokens of such premium, prize or reward are, or are not, delivered to the player. *State v. Abbott*, 218 N. C. 470, 11 S. E. (2d) 539 (1940), followed in 218 N. C. 480, 11 S. E. (2d) 545 (1940).

Testimony as to Description and Operation of Machines.—In a prosecution under this section it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation. *State v. Davis*, 229 N. C. 552, 50 S. E. (2d) 668 (1948).

Cited in *State v. Finch*, 218 N. C. 511, 11 S. E. (2d) 547 (1940).

§ 14-305. Agreements with reference to slot machines or devices made unlawful.—It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machines or device, pursuant to which the user thereof may become entitled to receive any money, credit, allowance, or anything of value or additional chance or right to use such machines or devices, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1937, c. 196, s. 2.)

§ 14-306. Slot machine or device defined.—Any machine, apparatus or device is a slot machine or device within the provisions of §§ 14-304 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or in the playing of which the operator or user has a chance to make varying scores or tallies upon the outcome of which wagers might be made, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication or weight, entertainment or other thing of value. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies. (1937, c. 196, s. 3.)

An indictment charging the ownership and distribution of slot machines adapted

for use in such a way that as a result of the insertion of a coin the machine may be op-

erated in such a manner that the user may secure additional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made, follows the language of this section and is sufficient to charge the offense therein defined. *State v. Abbott*, 218 N. C. 470, 11 S. E. (2d) 539 (1940), followed in 218 N. C. 480, 11 S. E. (2d) 545 (1940).

Evidence.—Where it was admitted that the machines in question were owned by one defendant and rented by him to the

other defendants, testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes was evidence sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools, did not amount to a failure of the State's evidence upon the critical issue. *State v. Davis*, 229 N. C. 552, 50 S. E. (2d) 668 (1948).

§ 14-307. **Issuance of license prohibited.**—There shall be no State, county, or municipal tax levied for the privilege of operating the machines or devices the operation of which is prohibited by §§ 14-304 through 14-309. (1937, c. 196, s. 4.)

§ 14-308. **Declared a public nuisance.**—An article or apparatus maintained or kept in violation of §§ 14-304 through 14-309 is a public nuisance. (1937, c. 196, s. 5.)

§ 14-309. **Violation made misdemeanor.**—Any person who violates any provision of §§ 14-304 through 14-309 is guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 196, s. 6.)

ARTICLE 38.

Marathon Dances and Similar Endurance Contests.

§ 14-310. **Dance marathons and walkathons prohibited.**—It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests, by whatever name called, of walking or dancing, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest, and/or similar physical endurance contest by walking and dancing continuing or intended to continue for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of forty-eight hours. (1935, c. 13, s. 1.)

§ 14-311. **Penalty for violation.**—Any persons violating the provisions of this article shall be guilty of a misdemeanor and shall be punishable by imprisonment in the county or municipal jail for not less than thirty days nor more than ninety days, or by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), or by both such fine and imprisonment in the discretion of the court. (1935, c. 13, s. 2.)

§ 14-312. **Each day made separate offense.**—Each and every day that any person, firm or corporation shall continue such a contest or engage in any such activities and/or each day's participation in such contest or advertisement of the same or do any act in violation of the provisions of this article shall be and constitute a distinct and separate offense. (1935, c. 13, s. 3.)

ARTICLE 39.

Protection of Minors.

§ 14-313. **Selling cigarettes to minors.**—If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in

the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years, or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court. (1891, c. 276; Rev., s. 3804; C. S., s. 4438.)

Cross Reference.—As to giving intoxicants to unmarried minors under 17 years of age, see §§ 14-331 and 14-332.

§ 14-314. Aiding minors in procuring cigarettes; duty of police officers.—If any person shall aid or assist any minor child under seventeen years old in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

If shall be the duty of every police officer, upon knowledge or information that any minor under the age of seventeen years is or has been smoking any cigarette, to inquire of any such minor the name of the person who sold or gave him such cigarette, or the substance from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor, the officer shall forthwith cause a warrant to be issued for the person giving or selling, or aiding and abetting in the giving or selling of such cigarette or the substance out of which it was made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer, upon inquiry, the name of the person selling or giving him such cigarette, or the substance out of which it was made, shall be guilty of a misdemeanor. (1891, c. 276, s. 2; Rev., s. 3805; 1913, c. 185; C. S., s. 4439.)

§ 14-315. Selling or giving weapons to minors.—If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane or slingshot, he shall be guilty of a misdemeanor. (1893, c. 514; Rev., s. 3832; C. S., s. 4440.)

§ 14-316. Permitting young children to use dangerous firearms.—Any person, being the parent or guardian of, or standing in loco parentis to, any child under the age of twelve years, who shall knowingly permit such child to have the possession or custody of, or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such firearm be loaded or unloaded, or any other person who shall knowingly furnish such child any such firearm, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1913, c. 32; C. S., s. 4441.)

§ 14-317. Permitting minors to enter barrooms, billiard rooms and bowling alleys.—If the keeper or owner of any barroom, billiard room or bowling alley shall allow any minor to enter or remain in such barroom, billiard room or bowling alley, where before such minor enters or remains in such barroom, billiard room or bowling alley, the owner or keeper thereof has been notified by the parents or guardian of such minor not to allow him to enter or remain in such barroom, billiard room or bowling alley, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1897, c. 278; Rev., s. 3729; C. S., s. 4442.)

§ 14-318. Exposing children to fire.—If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or

enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (1893, c. 12; Rev., s. 3795; C. S., s. 4443.)

§ 14-319. Marrying females under sixteen years old.—If any person shall marry a female under the age of sixteen years, he shall be guilty of a misdemeanor. (1820, c. 1041, ss. 1, 2, P. R.; R. C., c. 34, s. 46; Code, s. 1083; Rev., s. 3368; C. S., s. 4444; 1947, c. 383, s. 1.)

Cross Reference.—As to capacity to marry in general, see § 51-2.

Editor's Note.—The 1947 amendment raised the minimum marriage age of females from fourteen to sixteen. **Cited in** Caroon v. Rogers, 51 N. C. 240 (1858).

§ 14-320. Separating child under six months old from mother.—It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the State for such purpose, without the written consent of either the county superintendent of public welfare of the county in which the mother resides, or of the county in which the child was born, or of a private child-placing agency duly licensed by the State Board of Public Welfare; but the written consent of any of the officials named in this section shall not be necessary for a child when the mother places the child with relatives or in a boarding home or institution inspected and licensed by the State Board of Public Welfare. Such consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars (\$500.00) or imprisoned for not more than one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; C. S., s. 4445; 1939, c. 56; 1945, c. 669; 1949, c. 491.)

Cross Reference.—As to adoption generally, see Chapter 48.

Editor's Note.—The 1939 amendment inserted a former provision as to investigation and report relating to child and mother. The 1949 amendment rewrote the section.

§ 14-321. Failing to pay minors for doing certain work.—Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1893, c. 309; Rev., s. 3428a; C. S., s. 4446.)

Cross Reference.—As to child labor regulations, see § 110-1 et seq.

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment by husband or parent.—If any husband shall willfully abandon his wife without providing her with adequate support, or if any father or mother shall willfully abandon his or her child or children, whether natural or adopted, without providing adequate support for such child or children, he or she shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father or mother shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living

child shall arrive at the age of eighteen years. (1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; Code, s. 970; Rev., s. 3355; C. S., s. 4447; 1925, c. 290; 1949, c. 810.)

Cross References.—As to failure of husband to provide adequate support for family, see § 14-325. As to competency of wife's testimony upon trial of husband for abandonment, see § 8-57. As to abandonment of child under sixteen by mother, see § 14-326.

Editor's Note.—The 1925 amendment added the proviso, which formerly applied only to the father.

The 1949 amendment rewrote this section and made it applicable to abandonment by mother. It also made the offense of abandoning a child apply to both natural and adopted children. See 27 N. C. Law Rev. 451.

The purpose of this section was to make unlawful a willful abandonment of a wife by a husband without providing adequate support for her. It is not made unlawful for a husband to simply willfully abandon his wife—a husband is not compelled to live with his wife if he provides her adequate support. *Hyder v. Hyder*, 215 N. C. 239, 1 S. E. (2d) 540 (1939); *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721 (1947).

Section must be strictly construed. *State v. Gardner*, 219 N. C. 331, 13 S. E. (2d) 529 (1941); *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721 (1947).

It has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime. *State v. Gardner*, 219 N. C. 331, 13 S. E. (2d) 529 (1941).

This section relates only to legitimate children. An illegitimate child is not protected thereby. *Allen v. Hunnicutt*, 230 N. C. 49, 52 S. E. (2d) 18 (1949), citing *State v. Gardner*, 219 N. C. 331, 13 S. E. (2d) 529 (1941).

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. *Ritchie v. White*, 225 N. C. 450, 35 S. E. (2d) 414 (1945).

If the mother is guilty of nonsupport, this section provides a remedy and this remedy is exclusive. *Hensen v. Thomas*, 231 N. C. 173, 56 S. E. (2d) 432, 12 A. 1. R. (2d) 1171 (1949).

Two Offenses Created.—This section evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the will-

ful abandonment by the father of his children of the marriage; especially when construed in connection with § 14-325, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." *State v. Bell*, 184 N. C. 701, 115 S. E. 190 (1922).

This section in express terms constitutes the abandonment of children by the father a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. *State v. Hinson*, 209 N. C. 187, 183 S. E. 397 (1936).

Due to continuing nature of the crime under this section, a person, arrested in Georgia and sought to be extradited to North Carolina, who temporarily came into the State after the commission of the crime, although for an innocent purpose, was a fugitive from justice when he again departed from the State. *Daugherty v. Hornsby*, 151 F. (2d) 799 (1945).

The willful failure and refusal to support an illegitimate child constitutes a continuing offense. *State v. Johnson*, 212 N. C. 566, 194 S. E. 319 (1937).

Construed with § 14-325.—Where the husband has been convicted of willfully abandoning his wife and minor children (under this section); and, secondly, of willfully failing to support them (§ 14-325), an order suspending judgment upon the second count, to take effect, however, upon the defendant's failure to comply with the order for support under this first one, is not objectionable as being conditional or alternative. *State v. Vickers*, 196 N. C. 239, 145 S. E. 175 (1928).

The Indictment.—An indictment against a husband for abandoning his wife must aver his failure to support her. *State v. May*, 132 N. C. 1020, 43 S. E. 819 (1903).

Abandonment Must Be Willful.—The willful abandonment of the wife is an essential element of the offense made criminal by this section, and this, the prosecutrix is required to show beyond a reasonable doubt. *State v. Smith*, 164 N. C. 475, 79 S. E. 979 (1913); *State v. Falkner*, 182 N. C. 793, 108 S. E. 756 (1921); *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721 (1947).

But there is no reversible error in the

charge of the court for omitting the word "willful" in one part thereof when he has elsewhere repeatedly instructed the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt. *State v. Taylor*, 175 N. C. 833, 96 S. E. 22 (1918).

Where the defendant is indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support under § 14-323, and an instruction that leaves out this essential element of the crime will be held for reversible error. *State v. Roberts*, 197 N. C. 662, 150 S. E. 199 (1929).

The word "willfully" as used in § 49-2 is used with the same import as in this section. *State v. Cook*, 207 N. C. 261, 176 S. E. 757 (1934).

Providing for Support.—It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of willfully abandoning them (§§ 14-322, 14-324), and an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of one thousand dollars comes within the provisions of the statute. *State v. Vickers*, 196 N. C. 239, 145 S. E. 175 (1928).

Where the husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the superior court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. *State v.*

Vickers, 196 N. C. 239, 145 S. E. 175 (1928).

Both Abandonment and Nonsupport Must Be Proved.—Both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense. *State v. Beam*, 181 N. C. 597, 107 S. E. 429 (1921).

"In *State v. Johnson*, 194 N. C. 378, 139 S. E. 697 (1927), it was said: 'An offending husband may be convicted of abandonment and nonsupport when—and only when—two things are established: First, a wilful abandonment of the wife; and, second, a failure to provide "adequate support for such wife, and the children which he may have begotten upon her." *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973 (1902); *State v. Toney*, 162 N. C. 635, 78 S. E. 156 (1913). The abandonment must be wilful, that is, without just cause, excuse or justification. *State v. Smith*, 164 N. C. 475, 79 S. E. 979 (1913). And both ingredients of the crime must be alleged and proved. *State v. May*, 132 N. C. 1020, 43 S. E. 819 (1903).' " *State v. Yelverton*, 196 N. C. 64, 144 S. E. 534 (1928).

The husband's act becomes criminal when and only when he, having willfully or wrongfully separated himself from his wife, intentionally and without just cause or excuse, ceases to provide adequate support for her according to his means and station in life. *State v. Carson*, 228 N. C. 151, 44 S. E. (2d) 721 (1947), citing *State v. Hooker*, 186 N. C. 761, 120 S. E. 449 (1923).

Good Faith of Abandonment Question for Jury.—In a prosecution of a husband for abandonment the question whether such abandonment was in good faith for the causes assigned is for the jury. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973 (1902).

Separation by Consent.—Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of this section. *State v. Smith*, 164 N. C. 475, 79 S. E. 979 (1913).

An offer of a home when not made in good faith, and when refused, is equivalent to abandonment by the husband. *State v. Smith*, 164 N. C. 475, 79 S. E. 979 (1913).

Divorce after First Conviction No De-

fense on New Trial.—Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, under this section, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168 (1923).

Abandonment of Children after Divorce.—The father's duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. *State v. Bell*, 184 N. C. 701, 115 S. E. 190 (1922).

Denial of Paternity.—Where the husband in an action for nonsupport for a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. *State v. Ray*, 195 N. C. 628, 143 S. E. 216 (1928).

Wife Guilty of Adultery.—Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973 (1902).

Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756 (1921).

While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating this section, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. *State v. Johnson*, 194 N. C. 378, 139 S. E. 697 (1927).

Competency of Wife's Testimony.—Under § 8-57 the wife is a competent witness against her husband "as to the fact of abandonment, or neglect to provide adequate support." She is not, however, a competent witness to prove the fact of marriage. *State v. Brown*, 67 N. C. 470 (1872). See § 8-57 and notes thereunder.

Not a Continuing Offense.—The crime of willful abandonment by the husband of his wife is not a continuing offense, day by

day, and where there has been a complete act of abandonment and no renewal of the marital association, the act must have occurred within two years next before indictment found. *State v. Hannon*, 168 N. C. 215, 83 S. E. 701 (1914).

Condonation by Wife Does Not Bar Prosecution.—Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. *State v. Manon*, 204 N. C. 52, 167 S. E. 493 (1933).

Jurisdiction.—The constructive domicile of the wife is that of her husband, and where he has resided in another state and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. *State v. Sneed*, 197 N. C. 668, 150 S. E. 197 (1929).

Venue.—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of this section is in that county. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449 (1923).

Same—Where Husband Nonresident.—Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another state, he cannot direct her choice of residence and is indictable under this section in the county of her residence. *State v. Beam*, 181 N. C. 597, 107 S. E. 429 (1921).

Statute of Limitations.—Where the abandonment consisted in the failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449 (1923).

Same—Renewal of Cohabitation.—Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while,

and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh abandonment and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. *State v. Beam*, 181 N. C. 597, 107 S. E. 429 (1921).

Same—Promise and Gifts.—The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings under this section for his willfully abandoning them. *State v. Bell*, 184 N. C. 701, 115 S. E. 190 (1922).

Instruction.—Plaintiff's contention that the court should have charged that the failure to provide support under this section must have been willful in order to constitute an abandonment is untenable. *Hyder v. Hyder*, 215 N. C. 239, 1 S. E. (2d) 540 (1939).

Plea in Abatement after Plea of Not Guilty.—Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section, his plea in abatement comes too late after his plea of not guilty. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449 (1923).

Amendment of Complaint.—See § 1-129.

An instruction which omits the element of willful abandonment as a necessary predicate for a verdict of guilty is reversible error. *State v. Gilbert*, 230 N. C. 64, 51 S. E. (2d) 887 (1949).

Sufficient Evidence to Show Willful Abandonment and Failure to Support Minor Child.—Evidence that defendant refused to support his minor child although repeated demands were made on him after the parties had returned to this State, is held to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since this section provides that the abandonment by the father of a minor child shall constitute a continuing offense. *State v. Hinson*, 209 N. C. 187, 183 S. E. 397 (1936).

Institution of bastardy proceedings prior to birth of child is insufficient to establish such abandonment as is contemplated by this section. In re Adoption of Doe, 231, N. C. 1, 56 S. E. (2d) 8 (1949).

Presence in State When Crime Commit-

ted.—In habeas corpus proceedings, in which petitioner, charged with a violation of this section was held under warrant of governor of Georgia, evidence did not carry petitioner's burden of showing that he was not in North Carolina when the crime was committed. *Daugherty v. Hornsby*, 151 F. (2d) 799 (1945).

Punishment for Violation.—Our Constitution, Art. II, § 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction, leaves the matter of establishing a house of correction to the discretion of the legislature, and a husband convicted of abandonment under this section, may be imprisoned or assigned to work on the roads during his term. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 163 (1923).

Husband Cannot Be Twice Convicted.—A husband once convicted of an abandonment of his wife cannot be again tried for the same offense, he not having lived with her since the original abandonment. *State v. Dunston*, 78 N. C. 418 (1878).

Autrefois Acquit and Convict.—In a prosecution for the violation of this section a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. *State v. Jones*, 201 N. C. 424, 160 S. E. 468 (1931).

Wife Not Deprived of Civil Remedies.—Requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, under this section, does not deprive the wife of her civil remedies under the provisions of § 50-16. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756 (1921).

Quoted in *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928).

Applied in *State v. Woodland*, 119 N. C. 779, 25 S. E. 719 (1896); *Junior Order of United American Mechanics v. Tate*, 212 N. C. 305, 193 S. E. 397, 113 A. L. R. 1514 (1937).

Cited in *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707 (1889); *State v. Henderson*, 207 N. C. 258, 176 S. E. 758 (1934); *State v. McDay*, 232 N. C. 388, 61 S. E. (2d) 86 (1950); *State v. Campo*, 233 N. C. 79, 62 S. E. (2d) 500 (1950); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217 (1941).

§ 14-323. Evidence that abandonment was willful.—If the fact of abandonment of and failure to provide adequate support for the wife and children

shall be proved, or, while being with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful. (1868-9, c. 209, s. 3; Code, s. 971; Rev., s. 3356; C. S., s. 4448.)

When Evidence for Defendant Necessary.—Where the nonsupport and abandonment of the husband are both established or admitted, under this section, it may be necessary for the defendant to come forward with his evidence and proof

that the abandonment was not willful to avoid the risk of an adverse verdict. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756 (1921).

Cited in *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707 (1889).

§ 14-324. Order to support from husband's property or earnings.—Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant. (1917, c. 259; C. S., s. 4449.)

Judgment Held Sufficiently Certain and Definite.—A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. *State v. Vickers*, 197 N. C. 62, 147 S. E. 673 (1929). See notes to § 14-322.

In Addition to § 14-322.—This section is in addition to the powers conferred by § 14-322, and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168 (1923).

"Husband," Applies after Divorce.—This section, uses the word "husband" as *descriptio personae*, in his relation to the child of the marriage to whom his duty of support continues after a decree of divorce has been entered; and does not confine the offense to the abandonment of the wife. *State v. Bell*, 184 N. C. 701, 115 S. E. 190 (1922).

A judgment under this section is not conditional because of an order that capias issue at any time on motion of the solicitor, for such order is void and not a part of

judgment and capias may issue upon an order of the court. *State v. Manon*, 204 N. C. 52, 167 S. E. 493 (1933).

The practice of suspending judgments or staying executions in criminal prosecutions upon reasonable and just terms, with the consent of defendant, is established by custom and judicial decision, and in prosecutions for abandonment has received express legislative sanction under this section. *State v. Henderson*, 207 N. C. 258, 176 S. E. 758 (1934).

Judgment Entered without Notice after Default in Payment Is Void.—In *State v. Brooks*, 211 N. C. 702, 191 S. E. 749 (1937), an order was entered requiring the defendant to pay into the clerk's office for the support and maintenance of his children certain monthly stipulated amounts, after indictment under § 14-322. Default having been made in said payments, judgment was entered upon the defendant's original plea without his knowledge or presence, and the defendant was sentenced to two years on the road. It was held that the judgment was void because entered without the knowledge or presence of the accused.

Suspension of Judgment.—Upon conviction of abandonment, the suspension of judgment upon conditions for the support and maintenance of the minor child is expressly authorized by this section. *State v. Johnson*, 230 N. C. 743, 55 S. E. (2d) 690 (1949).

§ 14-325. Failure of husband to provide adequate support for family.—If any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten

upon her, he shall be guilty of a misdemeanor. Upon conviction of any husband as herein provided, the court having jurisdiction thereof may in his discretion make such order as in his judgment will best provide for the support of such wife or children, and may commit the said husband to the common jail of the county, to be hired out by the county commissioners for such length of time as the court may deem proper, which said wage or salary shall be paid to the said wife or children, to be used toward their support. (1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92; Code, s. 972; Rev., s. 3357; C. S., s. 4450; 1921, c. 103.)

Cross Reference.—As to abandonment of wife and children, see § 14-322.

Editor's Note.—The 1921 amendment added the last sentence.

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its wilful neglect or abandonment. *Ritchie v. White*, 225 N. C. 450, 35 S. E. (2d) 414 (1945).

Sufficiency of Warrant.—A warrant charging defendant with willfully neglecting to provide adequate support for his wife and two children is sufficient to express the charge against defendant and to apprise him of its nature, and defendant's motion in arrest of judgment on the ground that it omitted to charge that he had begotten the children, is properly denied, the question of paternity having been raised and submitted to the jury upon the conflicting evidence. *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675 (1949).

Amendment of Warrant.—The trial court has authority to permit the solicitor to amend a warrant charging the defendant with wilful neglect to support his

wife and two children by inserting the words "while living with his wife" to conform to the language of this section. *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675 (1949).

Sufficiency of Indictment.—An indictment charging violation and following the words of the statute is sufficient. *State v. Kerby*, 110 N. C. 558, 14 S. E. 856 (1892).

Submission of Issues.—Where, in a prosecution for willfully neglecting to provide adequate support for wife and children, defendant sets up the defense of the adultery of the wife and non-paternity of the youngest child, the submission of written issues by the court as to the paternity of the child, the adultery of the wife, and the guilt or innocence of defendant of offense charged, will not be held for error on defendant's appeal, the jury being instructed that the burden is on the State to prove defendant's guilt beyond a reasonable doubt as to each of the essential elements of the offense. *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675 (1949).

Cited in *State v. Bell*, 184 N. C. 701, 115 S. E. 190 (1922).

§ 14-326. Abandonment of child by mother.—If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

Cross Reference.—As to statute affecting this section, see § 14-322.

Cited in *In re Adoption of Doe*, 231 N. C. 1, 56 S. E. (2d) 8 (1949).

ARTICLE 41.

Intoxicating Liquors.

§ 14-327. Adulteration of liquors.—If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as provided in the following section, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this State any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1858-9, c. 57, ss. 1, 4; Code, s. 982; Rev., s. 3512; C. S., s. 4451.)

Cross Reference.—As to regulation of intoxicating liquors, see chapter 18.

§ 14-328. Selling recipe for adulterating liquors.—If any person shall

sell or offer for sale any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is herein provided, he shall be guilty of a felony, and shall be fined or imprisoned as is provided in the preceding section: Provided, that this section and the two sections that immediately precede and follow it respectively shall not be so construed as to prevent druggists, physicians and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes. (1858-9, c. 57, ss. 2, 3; Code, s. 984; Rev., s. 3513; C. S., s. 4452.)

§ 14-329. Manufacturing or selling poisonous liquors.—If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, he shall be guilty of a felony and shall be imprisoned in the State's prison not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen, after making purchase of any spirituous liquor, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter, it shall be prima facie evidence against the party making such a sale. (1873-4, c. 180, ss. 1, 2; Code, s. 983; Rev., s. 3522; C. S., s. 4453.)

§ 14-330. Selling or giving away liquor near political speaking.—If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which such speaking shall take place, he shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. (1879, c. 212; Code, s. 1079; Rev., s. 3528; C. S., s. 4454.)

§ 14-331. Giving intoxicants to unmarried minors under seventeen years old.—If any person shall give intoxicating drinks or liquors to any unmarried minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in giving such drinks or liquors to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court; but nothing in this section shall prevent any parent or other person standing in loco parentis from giving or administering any such drinks or liquors to his minor child for medicinal purposes, nor any physician from giving or administering such drinks or liquors to any minor patient under his care; nor shall this section apply to the giving or using of wine in the administration of the sacrament. (1915, c. 82; C. S., s. 4455.)

Cross Reference. — As to giving cigarettes to minors, see §§ 14-313 and 14-314.

§ 14-332. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.—If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing such person to be under the age of twenty-one years he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so

offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars. (1873-4, c. 68; 1881, c. 242; Code, ss. 1077, 1078; Rev., ss. 3524, 3525; C. S., s. 4456.)

For cases under this law, see *State v. Lawrence*, 97 N. C. 492, 2 S. E. 367 (1887); *State v. Walker*, 103 N. C. 413, 4 S. E. 582 (1889); *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103 (1892); *Spencer v. Fisher*, 158 N. C. 264, 73 S. E. 810 (1912); *Spencer v. Fisher*, 161 N. C. 116, 76 S. E. 731 (1912).

ARTICLE 42.

Public Drunkenness.

§ 14-333. Public drinking on railway passenger cars; copy of section to be posted.—Any person who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not to exceed thirty days. This section shall not apply to any smoking compartment or to any closet, dining or buffet car. It shall be the duty of all railway companies to have posted a copy of this section in all passenger coaches used for transporting passengers within the State. (1907, c. 455; C. S., s. 4457.)

§ 14-334. Public drunkenness and disorderliness.—It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in North Carolina; person or persons convicted of a violation hereof shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days in the discretion of the court. (1921, c. 211; C. S., s. 4457(a).)

Verdict of guilty of disorderly conduct under this section. *State v. Myrick*, but not of drunkenness will not support conviction for drunken and disorderly conduct 203 N. C. 8, 164 S. E. 328 (1932).

§ 14-335. Local: Public drunkenness.—If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Alamance, Ashe, Brunswick, Burke, Cherokee, Clay, Cleveland, Dare, Davidson, Davie, Duplin, Franklin, Gaston, Graham, Granville, Greene, Harnett, Haywood, Henderson, Hyde, Johnston, Lincoln, Madison, McDowell, Mitchell, Moore, Northampton, Orange, Perquimans, Pitt, Richmond, Rutherford, Scotland, Stanly, Union, Vance, Warren, Washington, Wayne, Wilkes and Yadkin, and at Pungo in Beaufort County. (1907, cc. 305, 785, 900, 976; 1908, c. 113; 1909, c. 815; Pub. Loc. 1915, c. 790; Pub. Loc. 1917, cc. 447, 475; Pub. Loc. 1919, cc. 148, 200; C. S., s. 4458; Ex. Sess. 1924, c. 5; 1929, c. 135; 1931, c. 219; 1935, c. 49, s. 1; 1935, c. 208; 1937, cc. 46, 96, 286, 329, 443; 1941, cc. 334, 336; 1945, cc. 215, 254; 1947, c. 12, s. 1; 1947, c. 109; 1949, cc. 215, 217, 1193; 1951, cc. 20, 255, 731.)

2. From and after February 28, 1935, it shall be lawful for any justice of the peace in Cherokee, Jackson and Clay counties, or any mayor of any incorporated city or town in said counties, in imposing the prison sentence provided for in this section as amended, to sentence the defendant to thirty days in prison to be assigned to work on the highways of the State of North Carolina under the supervision of the State Highway and Public Works Commission, and in any case where any such defendant is so sentenced for as much as thirty days it shall be lawful for, and the duty of, the State Highway and Public Works

Commission to receive and work such prisoner, as is now provided by law in case of sentences by judges of the superior court. (1935, c. 49, s. 4; 1939, c. 55.)

3. By a fine of not less than three dollars nor more than fifty dollars, or by imprisonment for not more than thirty days, in Yancey County. (1909, c. 256; C. S., s. 4458.)

4. By a fine of not less than two dollars and fifty cents nor more than fifty dollars, or by imprisonment for not more than thirty days, in Buncombe County. (1909, c. 271; C. S., s. 4458.)

5. By a fine of not more than fifty dollars (\$50.00) or imprisonment for not more than thirty days, in Wake County. (1907, c. 908; C. S., s. 4458; 1949, c. 246.)

6. By a fine of not less than five dollars nor more than fifty dollars, or by imprisonment for not more than ten days, in the village of Kannapolis, or on the premises or within one mile of the Kannapolis cotton mills. (1909, c. 46, s. 2; C. S., s. 4458.)

7. By a fine, for the first offense, of not less than ten nor more than twenty dollars; for second and further offense, not less than twenty nor more than thirty dollars, or imprisoned for not more than twenty days, in Transylvania County. (1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, cc. 116, 124, 523, 758; Rev., s. 3733; Pub. Loc. 1919, c. 190; C. S., s. 4458.)

8. By a fine of fifteen dollars or imprisonment for ten days for the first offense; by a fine of twenty-five dollars or imprisonment for twenty days for the second offense; by a fine of fifty dollars or imprisonment for thirty days for the third and subsequent offenses, in the King High School District, Stokes County. (1933, c. 287; 1949, c. 215; 1951, c. 731.)

9. By a fine of not less than five dollars or more than fifty dollars or by imprisonment for not more than thirty days, in the discretion of the court in Swain County. (1933, c. 10.)

10. In Caldwell, Catawba, Mecklenburg, Montgomery, Nash, Pender, and Wilson counties, by a fine, for the first offense of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months' period, such third offense is to be declared a misdemeanor, punishable within the discretion of the court. (1935, cc. 284, 350; 1943, c. 268, ss. 1-3; 1945, cc. 215, 254; 1949, c. 1154.)

11. In Guilford and Surry counties, by a fine, for the first offense, of not more than fifty dollars, or imprisonment for not more than thirty days; for the second offense within a period of twelve months by a fine of not more than one hundred dollars, or imprisonment for not more than sixty days; and for the third offense within any twelve months' period, such third offense to be declared a misdemeanor, punishable as a misdemeanor, within the discretion of the court. (1935, c. 207; 1937, c. 203; 1941, cc. 82, 150.)

12. In Edgecombe and Lenoir counties, by a fine, for the first offense, of not more than fifty dollars (\$50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars (\$100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court. (1937, c. 95; 1949, c. 217.)

13. In Jackson County, any person violating this section shall be guilty of a misdemeanor and, upon conviction, shall be punished in the discretion of the court. Provided, that in the event the county commissioners abolish the recorder's court of said county, then, and in that event, this subsection shall not apply to Jackson County. (Pub. Loc. 1927, c. 17; Pub. Loc. 1931, c. 413.)

13a. In Macon County, by a fine of not less than ten dollars, nor more than

fifty dollars, or imprisonment for thirty days. (Pub. Loc. 1927, c. 17; Pub. Loc. 1929, c. 1; Pub. Loc. 1931, c. 32.)

14. Any person or persons found drunk or intoxicated on the public highway, or at any public place or meeting in Currituck County, shall be guilty of a misdemeanor and upon conviction shall be fined not less than ten dollars (\$10.00), nor more than fifty dollars (\$50.00) for each offense, or be imprisoned not exceeding thirty (30) days, at the discretion of the court.

Upon complaint before any justice of the peace, he shall issue a warrant for the arrest of the accused and in the absence of a duly authorized officer to execute the said warrant, he shall deputize any citizen to execute the same. (1943, c. 506.)

15. It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in Avery County, and any person convicted of a violation hereof shall be guilty of a misdemeanor and fined not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each offense, or be imprisoned not exceeding thirty days, at the discretion of the court. (1947, c. 12, s. 2; 1947, c. 445; 1949, c. 891.)

Editor's Note. — The 1929 amendment made subsection 1 applicable to Northampton.

The 1933 amendments struck out Swain from the list of counties in subsection 1 and added subsections 8 and 9.

The 1935 amendments made subsection 1 applicable to Cherokee, Clay and Orange, made subsection 2 applicable to Cherokee, Clay and Jackson, added subsections 10 and 11 and deleted former subsections applicable to Cherokee and Clay.

The 1937 amendments made subsection 1 applicable to Alamance, Avery, Brunswick, Davie, Duplin, Johnston, Mitchell, Wilkes and Yadkin; made subsection 11 applicable to Surry, and added subsection 12.

The 1941 amendments made subsection 1 applicable to Burke and Wayne.

The 1943 amendments struck Mecklenburg County and the townships of Poplar Branch and Fruitville in Currituck County from the list in subsection 1, made changes in subsection 10, and added subsection 14.

The first 1945 amendment transferred Catawba County from subsection 1 to subsection 10. The second 1945 amendment

transferred Harnett County from subsection 10 to subsection 1. The 1947 amendments struck out "Avery" from the list of counties in subsection 1, inserted "Lenoir" therein and added subsection 15.

The 1949 amendments inserted "Davidson" in the list of counties in subsection 1; transferred Graham County from subsection 1 to subsection 8; transferred Lenoir County from subsection 1 to subsection 12; increased the maximum punishment in Wake County; made "Caldwell" subject to subsection 10; and changed the law relating to Avery County. Chapter 1193 of Session Laws 1949 superseded chapter 49, which provided for the insertion of Davidson County in subsection 11.

The first 1951 amendment inserted Perquimans in the list of counties in subsection 1, and the second 1951 amendment added Granville to the list. The third 1951 amendment repealed Session Laws 1949, c. 215, which had transferred Graham County from subsection 1 to subsection 8, reinserted Graham in subsection 1 and struck out the reference thereto in subsection 8.

ARTICLE 43.

Vagrants and Tramps.

§ 14-336. **Persons classed as vagrants.** — If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person may be fined or imprisoned, or both, in the discretion of the court:

1. Persons wandering or strolling about in idleness who are able to work and have no property to support them.

2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.

3. All persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood.

4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.

5. Professional gamblers living in idleness.

6. All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old.

7. Keepers and inmates of bawdy-houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy-house, or lessening the punishment by law for such crime. (1905, c. 391; Rev., s. 3740; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1; C. S., s. 4459.)

Cross Reference.—As to prostitution, see § 14-203.

Editor's Note.—For a case decided under the former law, Acts 1886, c. 42, see *State v. Custer*, 65 N. C. 339 (1871).

Insufficient Warrant.—A warrant charging defendant with living in the county without visible means of support and without working is insufficient to charge defendant with vagrancy. *State v. Harris*, 229 N. C. 413, 50 S. E. (2d) 1 (1948).

Amendment to Warrant.—Where a warrant in a criminal action charges the defendant with "being a vagrant," it is within the discretion of the judge to allow an amendment specifying the particular act under which it has been issued; and while it is the better practice to reduce the amendment to writing at the time, the order is self executing, and failure to do so does not destroy its legal effect. *State v. Walker*, 179 N. C. 730, 102 S. E. 404 (1920). See also *State v. Price*, 175 N. C.

804, 95 S. E. 478 (1918).

Admissibility of Evidence.—By express statutory provision (§ 14-188), the reputation that a house is kept as a bawdy-house may be received in evidence on the trial of a person for keeping one, under an indictment for vagrancy, etc., and the statute is constitutional and valid. *State v. Price*, 175 N. C. 804, 95 S. E. 478 (1918).

Sufficiency of Evidence.—Evidence in a prosecution under this section held insufficient to support a conviction. *State v. Oldham*, 224 N. C. 415, 30 S. E. (2d) 318 (1944).

Imposition of Wrong Sentence.—Where a conviction for vagrancy has been legally had under this section, and the sentence has been imposed of imprisonment for twelve months allowed under § 14-208, the case will be remanded for the imposition of the proper sentence. *State v. Walker*, 179 N. C. 730, 102 S. E. 404 (1920).

§ 14-337. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.—It shall be the duty of the chief of police, marshal, constable or other chief ministerial officer of each city and town in this State to furnish every thirty days to the police justice, recorder, mayor or other trial officer of such city or town a list of the bawdy, assignation, lewd and disorderly houses and other places where illegal sexual intercourse is carried on, together with the names of the keepers and inmates of such houses and places, in such city or town; and it shall be the duty of such police justice, recorder, mayor or other trial officer, upon the filing of such list, to issue his warrant for the persons declared in subsection seven of § 14-336 to be vagrants, and to punish in accordance with the provisions of that section such of them as may be found guilty. In all trials under said subsection seven of § 14-336 any keeper or inmate of any of the houses or places named, or his employees, shall be competent and compellable to give evidence of the character and nature of such house or place and of the character and acts of the keepers and inmates thereof; but the person so testifying shall not be prosecuted or punished for the commission of any crime about which he shall have been required to testify.

If any chief of police, marshal, constable or other chief ministerial officer of any city or town shall fail to furnish the list of houses and places provided for in this section, or shall suppress the name of any person whom he is re-

quired herein to report, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (1907, c. 1012, ss. 2, 3; C. S., s. 4460.)

§ 14-338. Tramp defined and punishment provided; certain persons excepted.—If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of fourteen years, or to any blind person. (1879, c. 198, ss. 1, 4, 6; Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; Rev., s. 3735; C. S., s. 4461.)

Cross Reference.—As to release for good behavior of one committed to house of correction, see § 153-221.

§ 14-339. Trespassing and the carrying of dangerous weapons by tramps.—If any tramp shall enter any dwelling house or kindle any fire on the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed twelve months. (1879, c. 198, s. 2; Code, s. 3829; Rev., s. 3736; C. S., s. 4462.)

§ 14-340. Malicious injuries by tramps to persons and property.—If any tramp shall willfully and maliciously do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years. (1879, c. 198, s. 3; Code, s. 3830; Rev., s. 3737; C. S., s. 4463.)

§ 14-341. Arrest of tramps by persons who are not officers.—Any person, upon a view of any offense described in §§ 14-338 through 14-340, shall cause the offender to be arrested upon a warrant and taken before some justice of the peace, or he may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, he shall be entitled to the same fee as a sheriff. (1879, c. 198, s. 5; Code, s. 3832; Rev., s. 3738; C. S., s. 4464.)

ARTICLE 44.

Regulation of Sales.

§ 14-342. Selling or offering to sell meat of diseased animals.—If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (1905, c. 303; Rev., s. 3442; C. S., s. 4465.)

§ 14-343. Unauthorized dealing in railroad tickets.—If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor. (1895, c. 83, s. 1; Rev., s. 3764; C. S., s. 4466.)

Cited in *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927) (con. op.).

§ 14-344. Sale of athletic contest tickets in excess of printed price.

—It shall be unlawful for any person, firm or corporation to sell or offer for sale any ticket of admission to any baseball, basketball, football game or other athletic contest of any kind in excess of the sale price written or printed on such ticket or tickets. Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1941, c. 180.)

§ 14-345. Sale of cotton at night under certain conditions.—If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor. (1873-4, c. 62; 1874-5, c. 70; Code, s. 1006; 1905, c. 417; Rev., s. 3813; C. S., s. 4467.)

Local Modification. — Mecklenburg, 10 S. E. 143 (1889); State v. Yarboro, 194 Nash: C. S. 4467. N. C. 498, 140 S. E. 216 (1927).

Cited in State v. Moore, 104 N. C. 714,

§ 14-346. Sale of convict-made goods prohibited.—Except as herein-after provided, the sale anywhere within the State of North Carolina of any and all goods, wares and merchandise manufactured, produced or mined wholly or in part, by convicts or prisoners, except by convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions is hereby prohibited and declared to be unlawful.

The provisions of this section shall not apply to sales or exchanges between the State penitentiary and other penal, charitable, educational and/or custodial institutions, maintained wholly or in part by the State, or its political subdivisions, for use in said institution or by the wards thereof; nor shall the provisions of this section apply to the sale of cotton, corn, grain or other processed or unprocessed agricultural products, including seed for growing purposes, or to the sale of stone, quarried by convict labor, or to the sale of coal or chert mined by convict labor, in any mine operated by the State: Provided that this section shall apply with equal force to sales to the State or any political subdivision thereof by any State penal or correctional institution, including the State highway: Provided further that the State of North Carolina shall have the right of manufacturing in any of its penal or correctional institutions products to be used exclusively by the State or any of its agencies.

This section shall apply equally to convict or prison-made goods, wares or merchandise, whether manufactured, produced or mined within or without the State of North Carolina.

Any person, firm or corporation selling, undertaking to sell, or offering for sale any such prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to fine, or imprisonment, or both, in the discretion of the court. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4.)

§ 14-346.1. Sale of bay rum.—It shall be unlawful for any person, firm or corporation to sell or offer for sale any bay rum in the State of North Carolina, or to cause any delivery of bay rum to be made in the State of North Carolina pursuant to any sale thereof, except:

(1) When such sale is made to a pharmacy or drug store, supervised by a person licensed as a pharmacist or assistant pharmacist as described in G. S. 90-71;

(2) When such sale is made pursuant to a prescription of some duly licensed physician, or

(3) When such sale is made to a duly licensed barber for use in the course of treatments given or services performed in a barber shop, and not for resale.

Any person who violates any provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

The provisions of this section shall not apply to the following counties: Alamance, Anson, Beaufort, Brunswick, Burke, Camden, Caswell, Cleveland, Columbus, Craven, Currituck, Duplin, Edgecombe, Forsyth, Franklin, Gates, Greene, Halifax, Harnett, Hoke, Hyde, Johnston, Lenoir, Lincoln, Martin, Moore, Nash, New Hanover, Onslow, Pasquotank, Pender, Perquimans, Pitt, Randolph, Robeson, Rutherford, Stanly, Tyrrell, Wayne and Wilson. (1951, c. 1096.)

ARTICLE 45.

Regulation of Employer and Employee.

§ 14-347. **Enticing servant to leave master.**—If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to leave unlawfully the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months. (1866, c. 58; 1866-7, c. 124; 1881, c. 303; Code, ss. 3119, 3120; Rev., s. 3365; C. S., s. 4469.)

Cross Reference.—As to a similar provision in the case of landlord and tenant or cropper, see § 14-359.

In General. — The offense was not known to the common law, *State v. Rice*, 76 N. C. 194 (1877). The section applies only where there has been an enticement, and not where a servant merely leaves his employer, even though such leaving is in violation of a contract between the parties. *State v. Daniel*, 89 N. C. 553 (1883). Nor does the section apply to the parent of a minor child who commands such child to quit employment. *State v. Anderson*, 104 N. C. 771, 10 S. E. 47 (1889). But if a minor is induced to leave his employment by a stranger, not in loco parentis, such stranger is amenable to action under this section. *State v. Harwood*, 104 N. C. 724,

10 S. E. 171 (1889). The section does not apply where a mere contract to serve, not entered into, has been made. *Sears v. Whitaker*, 136 N. C. 37, 48 S. E. 517 (1904); *State v. Holly*, 152 N. C. 839, 67 S. E. 53 (1910).

A tenant or cropper of another is not his servant, within the meaning of this section. *State v. Etheridge*, 169 N. C. 263, 84 S. E. 264 (1915).

Sufficiency of Indictment.—It is not necessary to specify whether the contract is oral or written, nor the means by which the enticing was accomplished. *State v. Harwood*, 104 N. C. 724, 10 S. E. 171 (1889).

Cited in *Haskins v. Royster*, 70 N. C. 601 (1874).

§ 14-348. **Local: Hiring servant who has unlawfully left employer.**—If any person shall knowingly hire, employ, harbor or detain in his own service any servant, employee, tenant, or wage hand of any other person, who shall have contracted in writing, or orally, for a fixed period of time to serve his employer, and who shall have left the service of his employer in violation of his contract, he shall be guilty of a misdemeanor, and shall be civilly liable in damages to the party so aggrieved. This section shall apply to the following counties: Beaufort, Caswell, Edgecombe, Granville, Guilford, Halifax, Hertford, Pender, Person, Pitt, Richmond, Vance, Wake, Warren, Washington and Wayne. (1901, c. 682; 1903, c. 365; Rev., s. 3374; 1907, c. 238, s. 2; 1907, c. 402; 1919, c. 274; C. S., s. 4470.)

Cross Reference. — As to employing a tenant or cropper who has unlawfully violated a contract with his landlord, see § 14-358.

§ 14-349. **Enticing seamen from vessel.**—If any person shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days. (1879, c. 219, s. 1; 1881, c. 256, s. 1; Code, s. 1108; Rev., s. 3555; C. S., s. 4471.)

§ 14-350. **Secreting or harboring deserting seamen.**—If any person shall secrete or harbor any seaman who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed prima facie evidence that such person knew that such seaman was a deserter. (1879, c. 219, s. 2; 1881, c. 256, s. 2; Code, s. 1109; Rev., s. 3556; C. S., s. 4472.)

Cited in *State v. Barrett*, 138 N. C. 630,
50 S. E. 506 (1905).

§ 14-351. **Search warrants for deserting seamen.**—If any credible witness shall complain, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found; and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of the search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint. (1881, c. 256, s. 3; Code, s. 1110; Rev., s. 3557; C. S., s. 4473.)

§ 14-352. **Appeal in cases of deserting seamen regulated.**—In all cases arising under §§ 14-349 through 14-351, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to proceed immediately to reduce to writing the testimony of any witness whose testimony is material (if such witness shall be master, officer or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by the justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions. (1881, c. 256, ss. 4, 5; Code, s. 1111; Rev., s. 3558; C. S., s. 4474.)

§ 14-353. **Influencing agents and servants in violating duties owed employers.**—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract,

or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1; C. S., s. 4475.)

§ 14-354. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon.—No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpoena of any court, having jurisdiction of the crime denounced in § 14-353, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or in obedience to its subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2; C. S., s. 4476.)

Cross References.—As to constitutional provisions against self-criminating evidence see the North Carolina Constitution, Art. I, § 11, and notes thereto, and the United

States Constitution, Amendment V.

Editor's Note.—For an article discussing the limits to self-incrimination, see 15 N. C. Law Rev. 229.

§ 14-355. Blacklisting employees.—If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1; C. S., s. 4477.)

Intent of Section.—This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. *Seward v. Receivers*, 159 N. C. 241, 75 S. E. 34 (1912).

Remedial Provisions.—The provisions of this and the following section are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131 (1929).

What Constitutes a Violation.—Where

an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevented the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc., the employee is entitled to recover damages in his civil action against his former employer, and a demurrer *ore tenus* to a complaint setting forth this cause of action is bad. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131 (1929).

§ 14-356. Conspiring to blacklist employees.—It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such

discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1909, c. 858, s. 2; C. S., s. 4478.)

Editor's Note. — See notes to § 14-355. S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. Cited in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 61

§ 14-357. Issuing nontransferable script to laborers.—If any person who employs laborers by the day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word “nontransferable,” or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days. (1889, c. 280; 1891, cc. 46, 78, 167, 370, 456; 1895, c. 127; Rev., s. 3730; C. S., s. 4479.)

“Face Value” Defined. — The “face value” is the value expressed on the face of the writing in the commodity in which it is payable. *Marriner v. Roper Co.*, 112 N. C. 164, 16 S. E. 906 (1893).

not authorize the assignee of a ticket or scrip payable in merchandise to demand and receive payment in money instead of in merchandise. *Marriner v. Roper Co.*, 112 N. C. 164, 16 S. E. 906 (1893).

Rights of Assignee. — This section does

§ 14-357.1. Requiring payment for medical examination, etc., as condition of employment.—(1) It shall be unlawful for any employer, as defined in subsection (2) of this section, to require any applicant for employment, as defined in subsection (3), to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of the initial act of hiring.

(2) The term “employer” as used in this section shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company, doing business in or operating within the State.

Provided that this section shall not apply to any employer as defined in this subsection who employs less than twenty-five (25) employees.

(3) The term “applicant for employment” shall mean and include any person who seeks to be permitted, required or directed by any employer, as defined in subsection (2) hereof, in consideration of direct or indirect gain or profit, to engage in employment.

(4) Any employer who violates the provisions of this section shall be liable to a fine of not more than one hundred dollars (\$100.00) for each and every violation. It shall be the duty of the Commissioner of Labor to enforce this section. (1951, c. 1094.)

ARTICLE 46.

Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a misdemeanor and shall

be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson and Yadkin. (1905, cc. 297, 383, 445, 820; Rev., s. 3366; 1907, c. 8; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 639, 719, 869; Pub. Loc. 1915, c. 18; C. S., s. 4480; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635.)

Cross References.—As to similar provisions for master and servants, see § 14-347 et seq. As to ejectment of tenant, see § 42-26 and annotation thereto.

Editor's Note. — The 1920 amendment added Lee to the list of counties. The 1925 amendments added Randolph, Stokes and Surry. The 1927 amendment added Alamance, and the 1931 amendment added Vance.

The 1945 amendment inserted the words "with intent to defraud the landlord" and the words "with intent to defraud the tenant" in the first sentence. It also rearranged the names of the various counties in the section so as to appear in alphabetical order.

Yadkin County was added to the list of counties contained in this section by Public-Local Laws, 1915, c. 18.

Constitutionality of Section.—The pro-

visions of this section contravene Article I, § 16, of our State Constitution, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed. *State v. Williams*, 150 N. C. 802, 63 S. E. 949 (1909); *Minton v. Early*, 183 N. C. 199, 111 S. E. 347 (1922).

Jurisdiction.—A court of a justice of the peace has final jurisdiction of a willful abandonment of crop in violation of this section. *State v. Wilkes*, 149 N. C. 453, 62 S. E. 430 (1908).

Indictment Insufficient.—An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. *State v. Williams*, 150 N. C. 802, 63 S. E. 949 (1909).

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.—If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement with intent to defraud the tenant, or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land with intent to defraud the landlord, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances, for the amount thereof. This section shall apply only to the following counties: Alamance, Anson, Cabarrus, Caswell, Davidson, Franklin, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Lee, Lincoln, Moore, Person,

Randolph, Richmond, Rockingham, Rowan, Rutherford, Sampson, Stanly, Stokes, Union, Vance, Wake and Washington. (1905, c. 299, ss. 1-7; Rev., s. 3367; 1907, c. 84, s. 2; 1907, c. 238, s. 1; 1907, c. 543; 1907, c. 595, s. 2; 1907, c. 810; C. S., s. 4481; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; 1931, c. 136, s. 2; 1939, c. 95; 1945, c. 635; 1949, c. 83; 1951, c. 615.)

Cross Reference.—As to willful destruction of landlord's property by the tenant, see § 42-11.

Editor's Note. — The 1920 amendments added Lee and Rockingham to the list of counties; the 1923 amendment added Granville and Person; the 1925 amendment added Randolph; the 1927 amendment added Alamance; the 1929 amendment added Stanly; and in 1931 Stokes and Vance were added.

The 1939 amendment added Cabarrus, Davidson, Harnett and Washington.

The 1945 amendment inserted provisions relating to intent to defraud, and rearranged the names of the various counties in the section so as to appear in alphabetical order. The 1949 amendment made this section applicable to Hoke County, and the 1951 amendment made it applicable to Caswell County.

ARTICLE 47.

Cruelty to Animals.

§ 14-360. **Cruelty to animals; construction of section.**—If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor. In this section, and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food. (1881, c. 34, s. 1; 1881, c. 368, ss. 1, 15; Code, ss. 2482, 2490; 1891, c. 65; Rev., s. 3299; 1907, c. 42; C. S., s. 4483.)

Cross Reference.—As to livestock, see also § 14-366.

In General.—Anger does not excuse the killing when it was wilful and needless. *State v. Neal*, 120 N. C. 613, 27 S. E. 81 (1897). And under such circumstances the intent is immaterial. *Id.* In order to convict, however, there must be a finding that the act was "wilfully and unlawfully" done. *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183 (1894). Unnecessary suffering knowingly and willfully permitted constitutes the offense. *State v. Porter*, 112 N. C. 887, 16 S. E. 915 (1893).

The Indictment.—The facts constituting torturing, tormenting or cruel conduct must be set out when such conduct is charged. *State v. Watkins*, 101 N. C. 702, 8 S. E. 346 (1888). A charge that defendant "did unlawfully and wilfully beat" was held sufficient in *State v. Alleson*, 90 N. C. 733 (1884).

Injury to Prevent Depredations. — The fact that cows (*State v. Butts*, 92 N. C.

784 (1885)) or chickens (*State v. Neal*, 120 N. C. 613, 27 S. E. 81 (1897)) were trespassing on defendant's property is not a defense to an action under this section, where the killing or wounding was unnecessary. See also, *State v. Smith*, 156 N. C. 628, 72 S. E. 321 (1911).

Illustrations. — Shooting pigeons for sport (*State v. Porter*, 112 N. C. 887, 16 S. E. 915 (1893)) and poisoning chickens (*State v. Bossee*, 145 N. C. 579, 59 S. E. 879 (1907)) have been held violations of the section.

Hitting a runaway horse with a rock, however, has been held insufficient to sustain a direct verdict—the question of the wilful purpose to injure being for the jury. *State v. Isley*, 119 N. C. 862, 26 S. E. 35 (1896).

A dog is a useful animal within the meaning of this section. *State v. Dickens*, 215 N. C. 303, 1 S. E. (2d) 837 (1939).

Unnecessary to Show Dog Has Pecuniary Value. — It is unnecessary to show

that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the section. *State v. Smith*, 156 N. C. 628, 72 S. E. 321 (1911).

The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." *State v. Dickens*, 215 N. C. 303, 1 S. E. (2d) 837 (1939).

Justification. — In a prosecution for needlessly killing a useful dog, evidence that a dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog

had barked at night, is properly excluded from the evidence upon the State's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and previous offences committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal. *State v. Dickens*, 215 N. C. 303, 1 S. E. (2d) 837 (1939).

Applied in *State v. Holt*, 90 N. C. 749 (1884).

§ 14-361. **Instigating or promoting cruelty to animals.**—If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1881, c. 368, s. 6; Code, s. 2487; 1891, c. 65; Rev., s. 3300; C. S., s. 4484.)

Cited in *State v. Porter*, 112 N. C. 887, 16 S. E. 915 (1893).

§ 14-362. **Bearbaiting, cockfighting and similar amusements.**—If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1881, c. 368, s. 2; Code, s. 2483; 1891, c. 65; Rev., s. 3301; C. S., s. 4485.)

§ 14-363. **Conveying animals in a cruel manner.**—If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. Whenever an offender shall be taken into custody therefor by any officer, the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor. (1881, c. 368, s. 5; Code, s. 2486; 1891, c. 65; Rev., s. 3302; C. S., s. 4486.)

ARTICLE 48.

Animal Diseases.

§ 14-364: Repealed by Session Laws 1945, c. 635.

ARTICLE 49.

Protection of Livestock Running at Large.

§ 14-365. **Failing to show hide and ears of livestock killed while running at large.**—If any person shall kill any neat cattle, sheep or hogs in the

woods or range, and shall for two days fail to show the hide and ears to the nearest justice or to two freeholders, he shall be guilty of a misdemeanor. (R. C., c. 17, s. 2; Code, s. 2318; 1901, c. 546; Rev., s. 3315; 1907, c. 821; C. S., s. 4493.)

Local Modification.—Tyrrell: C. S. 4493.

§ 14-366. Molesting or injuring livestock.—If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. (1850, c. 94, ss. 1, 2; R. C., c. 34, s. 104; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; Rev., s. 3314; C. S., s. 4494.)

Local Modification. — Graham, Haywood, Jackson, Swain, Transylvania: C. S. 4494.

Cross Reference.—As to cruelty to ani-

mals, see § 14-360.

Applied in *State v. Pollard*, 83 N. C. 598 (1880); *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183 (1894).

§ 14-367. Altering the brands of and misbranding another's livestock.—If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny. (1797, c. 485, s. 2, P. R.; R. C., c. 34, s. 57; Code, s. 1001; Rev., s. 3317; C. S., s. 4495.)

Cross Reference.—As to cattle brands, their registration, defacement, etc., see § 80-45 et seq.

§ 14-368. Placing poisonous shrubs and vegetables in public places.—If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mockorange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (1887, c. 338; Rev., s. 3318; C. S., s. 4496.)

Cross Reference. — As to putting out poisonous foodstuffs, see § 14-401.

§ 14-369. Wounding, capturing or killing of homing pigeons prohibited.—It shall be unlawful for any person or persons at any time or in any manner to hurt, pursue, take, capture, wound, maim, disfigure or kill any homing pigeon then and there owned by another person, or to trap the same by use of any pit, pitfall, scaffold, cage, snare, trap, net, baited hook or similar trapping device, or make use of any drug, poison, explosive or chemical for the purpose of injuring, capturing or killing any such homing pigeon. Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished in the discretion of the court. (1941, c. 10.)

ARTICLE 50.

Protection of Letters, Telegrams, and Telephone Messages.

§ 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.—If any person wrongfully obtains, or attempts to obtain, any

knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulges to any but the person for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (1903, c. 599; Rev., s. 3848; C. S., s. 4497.)

§ 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.—If any person wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulges to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor. (1889, c. 41, s. 1; Rev., s. 3846; C. S., s. 4498.)

Cross Reference. — As to penalty for message within a reasonable time, see § failure to transmit an intrastate telegraphic 56-11.

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.—If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor. (1889, c. 41, s. 2; Rev., s. 3728; C. S., s. 4499.)

The Indictment. — It is necessary to charge, in an indictment for a violation of this section and to prove upon the trial, that the letter or telegram was “sealed,” or that it was published with knowledge that it had been opened and read without authority. *State v. Bagwell*, 107 N. C. 859, 12 S. E. 254 (1890).

ARTICLE 51.

Protection of Athletic Contests.

§ 14-373. Bribery of players, referees, umpires or officials.—If any person shall bribe, or offer to bribe, any player in any athletic contest with intent to influence his play, action, or conduct in any athletic contest, or if any person shall bribe, or offer to bribe, any referee, umpire, or other official of any athletic contest, with intent to influence his decision or bias his opinion or judgment, in relation to any athletic contest, or if any person shall bribe, or offer to bribe, any manager, or other official of an athletic club, league, association, or institution, by whatever name called, conducting said athletic contest, such person shall be guilty of a felony, and, upon conviction shall be punished by imprisonment in the State penitentiary for not less than one nor more than five years. (1921, c. 23, s. 1; C. S., s. 4499(a); 1951, c. 364, s. 1.)

Editor's Note. — The 1951 amendment changed this article, which formerly related to the protection of the game of baseball, so as to make it applicable to any athletic contest.

§ 14-374. Acceptance of bribes by players, referees, umpires or officials.—If any player in any athletic contest shall accept, or agree to accept, a bribe offered for the purpose of influencing his play, action, or conduct in any athletic contest, or if any referee, umpire, or other official of an athletic contest shall accept, or agree to accept, a bribe offered for the purpose of influencing his decision or biasing his opinions, rulings, or judgment, or if any manager or other official of an athletic club, league, association, or institution shall accept, or agree to accept, any bribe offered for the purpose of inducing him to lose or cause to be lost any athletic contest, as set out in § 14-373 of this article, such player, man-

ager, official, referee, or umpire shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the State penitentiary for not less than one nor more than five years. (1921, c. 23, s. 2; C. S., s. 4499(b); 1951, c. 364, s. 2.)

§ 14-375. Completion of offenses set out in sections 14-373 and 14-374.—To complete the offenses mentioned in §§ 14-373 and 14-374, it shall not be necessary that the player, manager, referee, umpire, or official shall, at the time, have been actually employed, selected, or appointed to perform his respective duties; it shall be sufficient if the bribe be offered, accepted, or agreed to with the view of probable employment, selection, or appointment of the person to whom the bribe is offered or by whom it is accepted. It shall not be necessary that such player, referee, umpire, manager, or other official actually play or participate in an athletic contest concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; C. S., s. 4499(c); 1951, c. 364, s. 3.)

§ 14-376. Bribe defined.—By a “bribe”, as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or in the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any player, referee, manager, umpire, club or league official, to see which game an admission fee may be charged, or in which athletic contest any player, manager, umpire, referee, or other official is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner defined to cover the true intention of the parties. (1921, c. 23, s. 4; C. S., s. 4499(d); 1951, c. 364, s. 4.)

§ 14-377. Intentional losing of athletic contest or aiding therein.—If any player, manager, referee, umpire, club or league official shall commit any willful act of omission or commission in playing or directing the playing of an athletic contest with intent to cause the club, league, association, or institution with which he is affiliated to lose an athletic contest; or if any referee, umpire, or other official in an athletic contest shall commit any willful act connected with his official duties for the purpose and with the intent to cause an athletic club, league, association, or institution to win or lose an athletic contest which it would not otherwise have won or lost under the rules governing the playing of such contest, he or they shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the State penitentiary for not less than one nor more than five years. (1921, c. 23 s. 5; C. S., s. 4499(e); 1951, c. 364, s. 5.)

§ 14-378. Venue.—In all prosecutions under this article, the venue may be laid in any county where the bribe herein referred to was given, offered, or accepted, or in which the athletic contest was carried on in relation to which the bribe was offered, given, or accepted, or the acts referred to in § 14-377 were committed. (1921, c. 23, s. 6; C. S., s. 4606(c); 1951, c. 364, s. 6.)

§ 14-379. Bonus or extra compensation.—Nothing in this article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager or other official by any person to encourage such manager, player, or other official to a higher degree of skill, ability, or diligence in the performance of his duties. (1921, c. 23, s. 7; C. S., s. 4499(f); 1951, c. 364, s. 7.)

§ 14-380: Repealed by Session Laws 1951, c. 364, s. 8.

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-381. Desecration of State and National flag.—Any person who

in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color or ensign of the United States or State flag or ensign of this State, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance upon which it is so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. Any person violating this section shall also forfeit a penalty of fifty dollars for each offense, to be recovered with costs in a civil action or suit in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this State, and such penalty, when collected, less the costs and expenses of the action or suit, shall be paid one-half to the person suing and one-half to the school fund of the county in which suit was brought; and two or more penalties may be sued for and recovered in the same action or suit.

The words, flag, standard, color or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be a flag, standard, color or ensign of the United States of America, or a picture or a representation of any of them, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe it to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of a flag, standard, color, ensign, article, substance, or thing, on which there is anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section. (1917, c. 271; C. S., s. 4500.)

§ 14-382. Pollution of water or lands used for dairy purposes.—It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned for not more than thirty days, or both, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222; C. S., s. 4501.)

Cross References.—As to pollution of discharge of deleterious matter into waters for the purpose of killing or catching fish, see § 113-245 and 113-170. As to

§ 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.—Any person, firm or corporation own-

ing lands or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all treetops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such treetops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor. (1913, c. 56; C. S., s. 4502.)

Constitutionality. — The section constitutes a valid exercise of the police power and is constitutional. *State v. Perley*, 173 N. C. 783, 92 S. E. 504 (1917).

The motive is immaterial and where the intent to violate the section is shown the defendant is punishable. *State v. Perley*, 173 N. C. 783, 92 S. E. 504 (1917).

§ 14-384. **Injuring notices and advertisements.**—If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (1885, c. 302; Rev., s. 3709; C. S., s. 4503.)

Cross Reference. — As to the unlawful posting of advertisements, see § 14-145.

§ 14-385. **Defacing or destroying public notices and advertisements.**—If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1876-7, c. 215; Code, s. 981; Rev., s. 3710; C. S., s. 4504.)

§ 14-386. **Erecting signals and notices in imitation of those of railroads.**—No person, firm or corporation other than a railroad or street railway company shall, for advertisement or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, in the discretion of the court. (1917, c. 230; C. S., s. 4505.)

§ 14-387: Repealed by Session Laws 1945, c. 635.

§ 14-388: Repealed by Session Laws 1943, c. 543.

§ 14-389. **Sale of Jamaica ginger.**—It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regularly practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall allow said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only. (Pub. Loc. 1913, c. 761; 1919, c. 288; C. S., s. 4507.)

§ 14-390. **Furnishing intoxicants, poisons or firearms to inmates of charitable and penal institutions.**—If any person shall sell or give to any inmate of any charitable or penal institution any intoxicating drink or any narcotic, poison or poisonous substance, except upon the prescription of a physician, or shall give or sell to any such inmate any deadly weapon, or any cartridge or ammunition for firearms of any kind, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned at the discretion of the court; and if he be an officer or employee of any institution of the State, he shall be dismissed from his office. (1899, c. 1, s. 52; Rev., s. 3517; C. S., s. 4508.)

Cross Reference. — As to conveying which to effect an escape to prisoners, see messages, weapons, or instruments with § 14-258.

§ 14-391. **Usurious loans on household and kitchen furniture or assignments of wages.**—Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale or otherwise, upon any article of household or kitchen furniture or upon any assignment or sale of wages, earned or to be earned, and shall take, receive, reserve or charge a greater rate of interest than six per cent, either before or after the interest may accrue, or who shall refuse to give receipts for payments on interest or principal of such loan, or who shall fail and refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security, shall be guilty of a misdemeanor, and in addition thereto shall forfeit double the interest which has been theretofore paid. (1907, c. 110; C. S., s. 4509; 1927, c. 72.)

Cross Reference.—As to interest in general, see § 24-1 et seq. Davis, 157 N. C. 648, 73 S. E. 130 (1911).

Editor's Note.—The 1927 amendment made this section applicable to the assignment of wages.

This section is constitutional. State v.

Interest Need Not Be Received.—The charge of the usurious interest constitutes the offense without the necessity of having received it. State v. Davis, 157 N. C. 648, 73 S. E. 130 (1911).

§ 14-392. **Digging ginseng on another's land during certain months.**—All persons shall be allowed to dig ginseng at any time of the year for the purpose of replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day's or part of a day's digging, and shall also be guilty of a misdemeanor. (1866-7, c. 60; Code, s. 1053; 1905, c. 211; Rev., ss. 3502, 3714; C. S., s. 4510.)

Cross Reference.—As to the larceny of ginseng, see § 14-79.

§ 14-393. **Purchase of ginseng; register to be kept; details.**—Every person, firm or corporation buying ginseng in any quantity shall keep a register, and shall keep therein a true and accurate record of each purchase, showing the

amount of the ginseng, the name and residence of the person from whom purchased, the source from which obtained, and amount paid for the same and the date of the purchase. A failure to comply with the above requirements, or the making of a false entry in regard to the purchasing of such ginseng, shall be a misdemeanor, punishable in the discretion of the court. (1923, c. 199; C. S., s. 4510(a).)

§ 14-394. Anonymous or threatening letters, mailing or transmitting.—It shall be unlawful for any person, firm, or corporation, or any association of persons in this State, under whatever name styled, to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such persons, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this section shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 112; C. S., s. 4511(a).)

Circumstantial evidence of defendant's guilt of transmitting a threatening letter held sufficient to sustain conviction and overrule defendant's motion for judgment as of nonsuit. *State v. Strickland*, 229 N. C. 201, 49 S. E. (2d) 469 (1948).

§ 14-395. Commercialization of American Legion emblem; wearing by nonmembers.—It shall be unlawful for any one not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the American Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Any one violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1923, c. 89; C. S., s. 4511(b).)

§ 14-396. Dogs on "Capitol Square" worrying squirrels.—It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, or to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (1925, c. 289.)

§ 14-397. Use of name of denominational college in connection with dance hall.—It shall be unlawful for any person, firm, corporation, club or society, by whatsoever name called, to use in connection with any dance, or dance hall, by advertisement, announcement, or otherwise, the name of any college, or any class or organization of any college operated and conducted by a religious denomination, unless the written permission of the dean of such college is given, permitting and allowing the use of the name of such denominational college, or a class or organization of the same in connection with such dance, or dance hall. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and subject to a fine of not less than one hundred dollars (\$100) or imprisonment for not less than sixty days. (1927, c. 6.)

§ 14-398. Theft or destruction of property of public libraries, museums, etc.—Any person who shall steal or unlawfully take or detain, or wilfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparatus, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of State or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed fifty dollars (\$50.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars (\$50.00), the person committing same shall be guilty of a felony, and shall upon conviction be punished in accordance with the laws applicable thereto. (1935, c. 300; 1943, c. 543.)

Editor's Note.—The 1943 amendment increased the amounts mentioned in this section from twenty to fifty dollars.

§ 14-399. Placing trash, refuse, et cetera, within one hundred and fifty yards of hard-surfaced highway.—It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left, temporarily or permanently, any trash, refuse, garbage, scrapped automobile, truck or part thereof within one hundred and fifty yards of a hard-surfaced highway where the highway is outside of an incorporated town, unless the trash, refuse, garbage, scrapped automobile, truck or part thereof, is concealed from the view of persons on the highway.

This section does not apply to domestic trash or garbage placed for removal, nor to junk yards which are the property of bona fide junk dealers and which are properly screened or fenced from the view of persons on the highway.

The placing or leaving of the articles or matter forbidden by this section shall, for each day or portion thereof that the act is done, constitute a separate offense.

A violation of this section is punishable by a fine of not less than ten dollars (\$10.00) and not more than fifty dollars (\$50.00) for each offense.

This section shall not apply to the counties of Alleghany, Ashe, Avery, Bertie, Brunswick, Buncombe, Cabarrus, Caswell, Columbus, Davidson, Duplin, Forsyth, Franklin, Gates, Granville, Guilford, Halifax, Hyde, Jackson, Lenoir, Lincoln, Macon, Madison, Martin, Mitchell, Montgomery, Moore, Person, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Vance, Watauga, Wilson, and Yancey. (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1.)

Editor's Note.—The 1937 amendment wrote the section, and the 1951 amendment struck out "Anson" from the list of accepted counties, the 1943 amendment re-

§ 14-400. Tattooing prohibited.—It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under twenty-one years of age. Any one violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 112, ss. 1, 2.)

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.—It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees, nor to poisons used in rat extermination. (1941, c. 181.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 479.

§ 14-401.1. Misdemeanor to tamper with examination questions.—Any person who purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law before the date of the examination for which they shall have been prepared, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1917, c. 146, s. 10; C. S., s. 5658.)

§ 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.—It shall be unlawful for any person, firm, or corporation, who or which is engaged in business as a detective, detective agency, or what is ordinarily known as "secret service work," or conducts such business, to engage in the business of collecting claims, accounts, bills, notes, or other money obligations for others, or to engage in the business known as a collection agency. Violation of the provisions hereof shall be a misdemeanor, punishable by a fine or imprisonment, or both, in the discretion of the court. (1943, c. 383.)

§ 14-401.3. Inscription on gravestone or monument charging commission of crime.—It shall be illegal for any person to erect or cause to be erected any gravestone or monument bearing any inscription charging any person with the commission of a crime, and it shall be illegal for any person owning, controlling or operating any cemetery to permit such gravestone to be erected and maintained therein. If such gravestone has been erected in any graveyard, cemetery or burial plot, it shall be the duty of the person having charge thereof to remove and obliterate such inscription. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1949, c. 1075.)

§ 14-401.4. Identifying marks on machines and apparatus; application to Department of Motor Vehicles for numbers.—(a) No person, firm or corporation shall willfully remove, deface, destroy, alter or cover over the manufacturer's serial or engine number or any other manufacturer's number or other distinguishing number or identification mark upon any machine or other apparatus, including but not limited to farm equipment, machinery and apparatus, but excluding electric storage batteries, nor shall any person, firm or corporation place or stamp any serial, engine, or other number or mark upon such machinery, apparatus or equipment except as provided for in this section, nor shall any person, firm or corporation purchase or take into possession or sell, trade, transfer, devise, give away or in any manner dispose of such machinery, apparatus or equipment except by intestate succession or as junk or scrap after the manufacturer's serial or engine number or mark has been wilfully removed, defaced, destroyed, altered or covered up unless a new number or mark has been added as provided in this section.

(b) Each seller of farm machinery, farm equipment or farm apparatus covered by this section shall give the purchaser a bill of sale for such machinery, equipment or apparatus and shall include in the bill of sale the manufacturer's serial number or distinguishing number or identification mark, which the seller warrants to be true and correct according to his invoice or bill of sale as received from his manufacturer, supplier, or distributor or dealer.

(c) Each user of farm machinery, farm equipment or farm apparatus whose manufacturer's serial number, distinguishing number or identification mark has been obliterated or is now unrecognizable, may obtain a valid identification number for any such machinery, equipment or apparatus upon application for such number to the Department of Motor Vehicles on or before July 1, 1951, accompanied by satisfactory proof of ownership and a subsequent certification to the Department by a member of the North Carolina Highway Patrol that said applicant has placed the number on the proper machinery, equipment or apparatus. The Department of Motor Vehicles is hereby authorized and empowered to issue appropriate identification marks or distinguishing numbers for machinery, equipment or apparatus upon application as provided in this section and the Department is further authorized and empowered to designate the place or places on the machinery, equipment or apparatus at which the identification marks or distinguishing numbers shall be placed. The Department is also authorized to designate the method to be used in placing the identification marks or distinguishing numbers on the machinery, equipment or apparatus.

(d) Any person, firm or corporation who shall violate any part of this section shall be guilty of a misdemeanor and upon plea of guilty or conviction shall be punished in the discretion of the court. (1949, c. 928; 1951, c. 1110, s. 1.)

Editor's Note.—The 1951 amendment rewrote this section.

§ 14-401.5. Practice of phrenology, palmistry, fortune telling or clairvoyance prohibited.—It shall be unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune telling and other crafts of a similar kind in the counties named herein. Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than one year or both such fine and imprisonment in the discretion of the court.

This section shall not prohibit the amateur practice of phrenology, palmistry, fortune telling or clairvoyance in connection with school or church socials, provided such socials are held in school or church buildings.

Provided that the provisions of this section shall apply only to the counties of Ashe, Bertie, Bladen, Camden, Carteret, Clay, Craven, Cumberland, Dare, Davidson, Duplin, Durham, Graham, Granville, Guilford, Halifax, Harnett, Haywood, Hertford, Hoke, Lee, Madison, Martin, Northampton, Onslow, Orange, Person, Polk, Richmond, Rockingham, Scotland, Vance, Wake and Warren. (1951, c. 314.)

Local Modification.—Durham: 1951, c. 1189.

§ 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.—It shall be unlawful for any person, firm, corporation or association to possess, use, store, sell or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas", or any container or device for holding or releasing the same; provided, the provisions of this section shall not apply to the possession, use, storage, sale or transportation of such gas by or for any of the armed services of the United States or of this State, or by or for any governmental agency, or municipal and State peace officers of this State or for

bona fide scientific, educational or industrial purposes, or for use in safes, vaults and depositories as a means of protection against robbery.

Any person, firm, corporation or association violating any provision of this section shall be guilty of a misdemeanor and punishable by fine or imprisonment in the discretion of the court. (1951, c. 592.)

ARTICLE 53.

Sale of Weapons.

§ 14-402. **Sale of certain weapons without permit forbidden.**—It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump-gun, bowie knife, dirk, dagger, slung-shot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump-gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the clerk of the superior court as provided in § 14-403. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, or both, in the discretion of the court. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781.)

Editor's Note.—The 1923 amendment added the second paragraph. The amendment made it a misdemeanor, not only to sell such deadly weapons without a license, but also to receive them, when sent by mail, express or freight, without exhibiting a permit or license. 1 N. C. Law Rev. 285.
The 1947 amendment inserted "slung-shot" and "blackjack" in the list of weapons in the first paragraph.

§ 14-403. **Permit issued by clerk of court; form of permit.**—The clerks of the superior courts of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:
North Carolina,
..... County.

I,, clerk of the Superior Court of said county, do hereby certify that whose place of residence is Street, in (or) in Township County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said to purchase one pistol, (or if any other weapon is named strike out the word pistol) from any person, firm or corporation authorized to dispose of the same.
This day of, 19.....

.....
Clerk Superior Court.

(1919, c. 197, s. 2; C. S., s. 5107.)

§ 14-404. Applicant must be of good moral character; weapon for defense of home; clerk's fee.—Before the clerk of the superior court shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said clerk shall not be so fully satisfied, he shall refuse to issue said license or permit: Provided, that nothing in this article shall apply to officers authorized by law to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fifty cents. (1919, c. 197, s. 3; C. S., s. 5108.)

§ 14-405. Record of permits kept by clerk.—The clerk of the superior court shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S., s. 5109.)

§ 14-406. Dealer to keep record of sales.—Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted State, county or police officer, within this State. (1919, c. 197, s. 5; C. S., s. 5110.)

§ 14-407. Weapons to be listed for taxes.—During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapon for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S., s. 5111.)

§ 14-408. Violation of sections 14-406 or 14-407 a misdemeanor.—Any person, firm, or corporation violating any of the provisions of §§ 14-406 or 14-407 shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1919, c. 197, s. 7; C. S., s. 5112.)

§ 14-409. Machine guns and other like weapons.—It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, sub-machine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the clerk of the superior court of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States army, when in discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties: Provided, further, that automatic shot-guns and pistols or other automatic weapons that shoot less than sixteen shots shall not be construed to be or mean a machine gun or sub-machine gun under this section; and that any bona fide resident of this State who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said ownership to the clerk of the superior court of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred (\$500.00) dollars, or

imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1.)

ARTICLE 54.

Sale, etc., of Pyrotechnics.

§ 14-410. **Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.**—It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: Provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: Provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged: Provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. (1947, c. 210, s. 1.)

§ 14-411. **Sale deemed made at site of delivery.**—In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ 14-412. **Possession prima facie evidence of violation.**—Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ 14-413. **Permits for use at public exhibitions.**—For the purpose of enforcing the provisions of this article, the board of county commissioners of any county are hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. (1947, c. 210, s. 4.)

§ 14-414. **Pyrotechnics defined; exceptions.** — For the proper construction of the provisions of this article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: Provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. (1947, c. 210, s. 5.)

§ 14-415. **Violation made misdemeanor.**—Any person violating any of the provisions of this article, except as otherwise specified in said article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1947, c. 210, s. 6.)

ARTICLE 55.

Handling of Poisonous Reptiles.

§ 14-416. **Handling of poisonous reptiles declared public nuisance and criminal offense.**—The intentional exposure of human beings to contact

with reptiles of a venomous nature being essentially dangerous and injurious and detrimental to public health, safety and welfare, the indulgence in and inducement to such exposure is hereby declared to be a public nuisance and a criminal offense, to be abated and punished as provided in this article. (1949, c. 1084, s. 1.)

§ 14-417. Regulation of ownership or use of poisonous reptiles.—It shall be unlawful for any person to own, possess, use, or traffic in any reptile of a poisonous nature whose venom is not removed, unless such reptile is at all times kept securely in a box, cage, or other safe container in which there are no openings of sufficient size to permit the escape of such reptile, or through which such reptile can bite or inject its venom into any human being. (1949, c. 1084, s. 2.)

§ 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.—It shall be unlawful for any person to intentionally handle any reptile of a poisonous nature whose venom is not removed, by taking or holding such reptile in bare hands or by placing or holding such reptile against any exposed part of the human anatomy, or by placing their own or another's hand or any other part of the human anatomy in or near any box, cage, or other container wherein such reptile is known or suspected to be. It shall also be unlawful for any person to intentionally suggest, entice, invite, challenge, intimidate, exhort or otherwise induce or aid any person to handle or expose himself to any such poisonous reptile in any manner defined in this article. (1949, c. 1084, s. 3.)

§ 14-419. Investigation of suspected violations; seizure and examination of reptiles; destruction or return of reptiles.—In any case in which any law enforcement officer has reasonable grounds to believe that any of the provisions of this article have been or are about to be violated, it shall be the duty of such officer and he is hereby authorized, empowered, and directed to immediately investigate such violation or impending violation and to forthwith seize the reptile or reptiles involved, and all such officers are hereby authorized and directed to deliver such reptiles to the respective county health authorities for examination and tests of such reptiles by such authorities or other qualified authorities to which the county health authorities may refer the same, for the purpose of ascertaining whether said reptiles contain venom and are poisonous. If such health authorities, or other qualified authorities designated by them to make such examinations and tests, find that said reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, and they are hereby authorized and directed to forthwith destroy such reptiles; but if said health authorities, or other qualified authorities by them designated to make such examination and tests, find that the reptiles are not dangerously poisonous, and are not and cannot be harmful to human life, safety, health or welfare, then it shall be the duty of such officers to return the said reptiles to the person from whom they were seized. (1949, c. 1084, s. 4.)

§ 14-420. Arrest of persons violating provisions of article.—If the examination and tests made by the county health or other qualified authorities as provided herein show that such reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, in addition to destroying such reptiles, also to arrest all persons violating any of the provisions of this article. (1949, c. 1084, s. 5.)

§ 14-421. Exemptions from provisions of article.—This article shall not apply to the possession, exhibition, or handling of reptiles by employees or agents of duly constituted museums, laboratories, educational or scientific institutions in the course of their educational or scientific work. (1949, c. 1084, s. 6.)

§ 14-422. **Violation made misdemeanor.**—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1949, c. 1084, s. 7.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

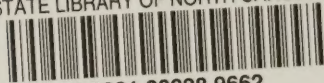
Raleigh, North Carolina

June 12, 1953

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing recompileation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY McMULLAN,
Attorney General of North Carolina

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